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The Differing Site Conditions Clause:

Time For A Change

By

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INTRODUCTION

The Differing Site Conditions Clause allows for adjustment in a contract price if the contractor encounters subsurface or latent physical conditions at the site which differ materially from those indicated in the contract, or if the contractor discovers unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The provision of the standard construction contract utilized by agencies of the Federal Government which calls for the contracting officer to make an equitable adjustment in contract price and/or performance time where these "changed conditions" are encountered, is said to represent a most enlightened effort by the Government to reduce the risk or gamble to the contractor of such unknown or unanticipated conditions otherwise attendant upon the performance of construction work.¹

Differing site conditions pose a major concern to all

¹ McNulty, "Changed Conditions (Differing Site Conditions) and Misrepresentations Under Government Construction Contracts" in *Construction Contract Changes, Changed Conditions and Equitable Adjustments, Government Contracts Monograph No. 3* (Washington, DC, The George Washington University, 1975) at 20.

parties involved in construction contracting. The various differing site conditions encountered are normally classified into two categories, treated separately by the Federal Acquisition Regulations (FAR). The first category, Type I, results when the physical conditions encountered during performance differ materially from those conditions indicated in the contract. The second category, commonly termed Type II differing site conditions, occur when the unknown physical conditions encountered are of an unusual nature, differing materially from conditions which would ordinarily be expected. Both Type I and Type II differing site conditions impact contract performance and have the potential of dramatically increasing performance costs.

The oft-stated purpose of the Differing Site Conditions clause in Government contracts is to avoid the inclusion by contractors of contingency allowances in their bids for construction contracts. However, no evidence exists demonstrating that bid prices are lower as a result of the Differing Site Conditions clause. Competition in construction contracting keeps bid prices at a reasonable level. This paper will discuss how there are no other considerations that would warrant the continued use of the Differing Site Conditions clause. Presently, the clause is widely used in the construction industry, and proves a consistent source of

an endless stream of litigation.

The following chapters will review the current meaning attributed to the clause. The various cases and appeals will demonstrate the problems associated with the use of the Differing Site Conditions clause. The text asserts that these problems can best be remedied by eliminating the FAR requirement for the insertion of the clause, and by ensuring that it is no longer used in Government contracts.

My primary assertion is that a more predictable and logical approach would be to separate that portion of the contract attributable to site preparation and to provide a mechanism for payment on a cost-reimbursement basis.

CHAPTER 1

BACKGROUND OF THE DIFFERING SITE CONDITIONS CLAUSE

What forces spawned this contentious clause? The history of Government contracts outlines attempts to allocate the risks and contingencies which contractors face in performing their work. In the field of construction, it is important for the contractor to protect himself from the risk that once the job is started, he could discover conditions materially different from those he expected.

An exhaustive historical treatment of the predecessor clause is beyond the scope of this thesis. However, it should be noted that in 1927, the Government commenced using a "changed conditions" clause in its fixed price construction contracts in order to eliminate the contingency factor in bidding, with the result that the risk of certain reasonably unexpected site conditions was placed on the Government.²

Early advocates of the Changed Conditions clause asserted that use of the clause would remove the element of "gambling" from Government contracts. Without the clause, the contractor could presumably include in every bid a contingency amount

² Currie et al., "Differing Site [Changed] Conditions," Briefing Papers No. 71-5 (October 1971) at 1.

based on a worst case scenario, resulting in increased bid prices.³ The previous clause "changed conditions" was substantially similar:

CHANGED CONDITIONS (SF 23A, Clause 4)

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of:

(a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or

(b) unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.

The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.⁴

Minor modifications of this clause resulted in the

³ Ruff v. United States, 96 Ct. Cl. 148, 164 (1942), "... the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered."

⁴ DAR 7-602.4 and FPR 1-7.602-4.

Differing Site Conditions clause which became effective on 1 February 1968. The current FAR clause (52.236-2) reads:

DIFFERING SITE CONDITIONS

(APR 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under his contract.⁵

In addition, in Government contract construction actions that are below certain dollar thresholds, FAR 43.205(e) requires the insertion of the FAR clause at 52.243-5.

⁵ FAR 52.236-2.

CHANGES AND CHANGED CONDITIONS (APR 1984)

(a) The Contracting Officer may, in writing, order changes in the drawings and specifications within the general scope of the contract.

(b) The Contractor shall promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.

(c) If changes under paragraph (a) or conditions under paragraph (b) increase or decrease the cost of, or time required for performing the work, the Contracting Officer shall make an equitable adjustment (see paragraph (d)) upon submittal of a "proposal for adjustment" (hereafter referred to as proposal) by the Contractor before final payment under the contract.

(d) The Contracting Officer shall not make an equitable adjustment under paragraph (b) unless-

(1) The Contractor has submitted and the Contracting Officer has received the required written notice; or

(2) The Contracting Officer waives the requirement for the written notice.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause.⁶

This clause is required for fixed price construction contracts where the contract is not expected to exceed the applicable small purchase limitation. This clause combines the elements of the Changes clause and the Differing Site

⁶ FAR 52.243-5.

Conditions clause.⁷

The principal distinction between the present Differing Site Conditions clause and the predecessor clause lies in the additional latitude with respect to the equitable adjustment which is permitted the contracting officer under the Differing Site Conditions clause. The Differing Site Conditions clause served the same basic purpose as the Changed Conditions clause.⁸ The Differing Site Conditions clause adds the language "...whether or not changed as a result of the conditions..." which allows for increased contracting officer discretion in determining the amount of an equitable adjustment.

The Differing Site Conditions clause allows for both a time extension and increased costs. Historically, however, complete relief was not afforded to the contractor. Basing its decision on the Supreme Court's ruling in United States v. Rice⁹, the General Services Board of Contract Appeals (GSBCA) in G.H. Swart, Inc.¹⁰, maintained that expense due to

⁷ Nash, "Government Contracts Changes," p. 2-12 (1989).

⁸ Hiestand, "A New Era in Government Construction Contracts." 28 Fed. B. J. 165 (1968) at 178.

⁹ United States v. Rice, 317 U.S. 61 (1942).

¹⁰ G. H. Swart, Inc., GSBCA No. 2819, 71-1 BCA ¶ 8,663.

delay is not compensable under a changed conditions clause even if caused by changed conditions or changes in specifications. The Rice Doctrine, as applied by various forums, stood for the proposition that when a contractor encountered changed conditions, the Government would pay for those costs attributable to overcoming the changed condition, but would only grant a time extension with respect to delay resulting to work not directly affected by the changed condition.¹¹

The Armed Services Board of Contract Appeals (ASBCA) has consistently reiterated the intent of the Differing Site Conditions clause. The purpose of the clause is to induce bidders to base their bids on the information and indications presented, so as to omit any contingency factor for the possibility of undisclosed subsurface conditions.¹² The contractor should be relieved of the necessity of allowing for contingencies in bid computation; the Government should benefit by the exclusion of such contingencies by receiving

¹¹ Ellison, "Changed Conditions": An Analysis Based on Recent Court and Board Decisions," 30 Fed. B. J. 13 (1971) at 14.

¹² Alps Construction Corp., ASBCA No. 16966, 73-2 BCA ¶ 10,309.

lower and more accurate bid prices.¹³

Encountering a different site condition does not automatically establish a successful claim under the Differing Site Conditions clause. The cases and appeals demonstrate that several other factors must be proven. The many disputes concerning the Differing Site Conditions clause are evident; a Westlaw Search revealed that the term "Differing Site Condition" is present in 77 board of contract appeal decisions in calendar year 1989.¹⁴ Of these 77 appeals, 62 involved specific allegations of differing site conditions. Relief was completely denied in 26 or approximately 42% of these decisions.

According to statistics computed by the ASBCA, the decided appeals in which the Differing Site Conditions clause was the principal contract clause in the dispute increased 78.8% from Fiscal Year (FY) 1984 to FY 1985.¹⁵ The ASBCA's FY

¹³ Frank Lill & Son, Inc., ASBCA No. 35774, 88-3 BCA ¶ 20,880. "This is consistent with the Differing Site Conditions clause policy of permitting contractors to rely on contract indications unless simple inquiries might have revealed contrary conditions."

¹⁴ Westlaw Search (4 August 1990).

¹⁵ Armed Services Board of Contract Appeals, Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year ending 30 September 1985, dated 31 October 1985.

1985 Annual Report indicated that 68 of their pending appeals listed Differing Site Conditions as the principal issue involved in the dispute. The ASBCA as well as the other boards of contract appeals and U.S. Claims Court continues to have a backlog of such cases. As several of these cases and appeals that are clogging the courts and boards of contract appeals allege differing site conditions, efforts should be concentrated on a more efficient and equitable treatment of differing site conditions.

CHAPTER 2

TYPE I CONDITIONS

A. OVERVIEW

The Differing Site Conditions Clause refers to two types of differing site conditions, commonly known as Type I and Type II conditions. While a summary review of the cases and appeals reveals more Type I cases, recovery is also possible for a Type II condition, which will be discussed in the following chapter.

Type I conditions are more frequently encountered than Type II differing site conditions due to the fact that the contract documents usually contain representations concerning the conditions.¹⁶ Relief for a Type I differing site condition depends upon whether the contractor has encountered a subsurface or latent physical condition which differs materially from conditions indicated in the contract

¹⁶ McClure, "Differing Site Conditions: Evaluating the Material Difference", 15 Pub. Con. L.J., No. 1, p. 138, 143.

documents.¹⁷ Boards of contract appeals and courts have upheld Type I claims in a variety of situations.

B. CONTRACT DOCUMENTS

The words "contract documents", as outlined in the FAR, are interpreted broadly -- including whatever statements, indications or representations the contract documents make.¹⁸ The term includes bidding documents as well as documents and materials referred to therein.¹⁹ The contract documents include the references in the invitation for bids, drawings, specifications, soil boring data, representations of the type of work to be done, and the geographical area of construction.²⁰

¹⁷ *Saturn Construction Company, Inc.*, ASBCA No. 22653, 82-1 BCA ¶ 15,704.

¹⁸ *Flippin Materials Co. v. United States*, 160 Ct. Cl. 357, 312 F.2d 408 (1963) ("...other Government materials (to which he is directed by the contract documents themselves) which qualify, expand or explain the particular segment of information on which the contractor intends to rely.")

¹⁹ *Hunt & Willett, Inc. v. United States*, 168 Ct. Cl. 256, 351 F.2d 980 (1964) (geologic report referenced on contract drawing); *Felton Construction Co.*, AGBCA No. 406-9, 81-1 BCA ¶ 14,932 (soil survey referenced in specifications).

²⁰ *T.F. Scholes, Inc. v. United States*, 174 Ct. Cl. 1215, 357 F.2d 963, 969 (1966).

There are three major types of documents which are often discussed in court and board of contract appeals decisions: physical data, design details, and cautionary information. All three types of documents merit a separate discussion due to their unique and troublesome aspects.

The most important and frequently-used type of contract indications is physical data--typically boring logs or tables depicting the properties of materials at various locations.²¹ While a contractor might naturally presume that these corings and borings leave little room for interpretation, problems often arise. Soil borings are considered the most reliable reflections of subsurface conditions.²² However, the contractor is responsible for extrapolating a picture of the material to be encountered from limited information provided by borings that are often spaced a thousand feet or more

²¹ Ruttinger, "The Differing Site Conditions Clause: What are 'Contract Indications'?", NCMA Journal, Summer 1986, p. 67, 68.

²² United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585, 597 (1966) (the contractor had properly relied on the boring logs and had been reasonable in ignoring a general provision in the specifications that "a condition of high ground water exists in the area.") See also Woodcrest Construction v. United States, 187 Ct. Cl. 249, 408 F.2d 406 (1969), cert. denied, 398 U.S. 958, 90 S. Ct. 2164 (1970).

apart.²³

Government technical manuals and regulations generally dictate how an agency should conduct soil borings.²⁴ However the time and expense of the borings is also a consideration, and it is likely that occasionally fewer borings are made than what is required by the regulations.

When the Government does not follow its own procedures or make as many borings as are necessary, it becomes more difficult for prospective contractors to generalize. However, the extrapolation that the contractor must accomplish is subject to a "reasonable" requirement. An unreasonable

²³ Ruttinger, *supra* note 21 at 68. "Nevertheless it has been consistently held that contractors may (and indeed must) rely on such data in formulating their bids."

²⁴ Air Force Manual 88-3, Chapter 7, paragraph 4-2. "Soil boring program. (a) Location and spacing. Borings spaced in a rigid pattern often do not disclose unfavorable subsurface conditions; therefore, boring locations should be selected to define geological units and subsurface nonconformities. Borings may have to be spaced at 40 feet or less when erratic subsurface conditions are encountered, in order to delineate lenses, boulders, bedrock irregularities, etc. When localized building foundation areas are explored, initial borings should be located near building corners, but locations should allow some final shifting on the site. The number of borings should never be less than three and preferably five-one at each corner and one at the center, unless subsurface conditions are known to be uniform and the foundation area is small. These preliminary borings must be supplemented by intermediate borings as required by the extent of the area, location of critical loaded areas, subsurface conditions, and local practice."

assumption of the amount of work to be accomplished has resulted in relief being denied.²⁵

The second major category of contract indications involves the design details. Apart from data that expressly address physical conditions at the site, contract specifications may give an indication of the site conditions.²⁶ Examples of implied indications which resulted in relief as set out in the boards of contract appeals and courts are many and varied and include:

1. an embankment design requiring certain sizes and types of stone and designation of a quarry for their production (indicating the quarry would provide enough stone);²⁷
2. A specification expressly stating that the concrete should be poured in the dry with no mention of the necessity of a special seal prior to pouring concrete, coupled with a note requiring stable footings (indicating stable ground and

²⁵ *Mojave Enterprises v. United States*, 3 Cl. Ct. 353, 356-7 (1983).

²⁶ *Ruttinger*, *supra* note 21 at 71.

²⁷ *Stock & Grove, Inc. v. United States*, 204 Ct. Cl. 103, 493 F.2d 629 (1974).

dry conditions);²⁸

3. the designation of specific borrow areas (indicating sufficient material to complete the job);²⁹

4. drawings that did not indicate the thickness of the concrete; however, plaintiff compared the length of the nipple (marked as six inches on the contract) with the cross-section of the floor shown thereon;³⁰

5. the failure to provide soil liquid limits (indicating that soils could be compacted without extraordinary effort);³¹

6. the specification requiring the use of heavy equipment (indicating that silty soil was sufficiently stable to support the weight of such equipment);³² or

7. configuration drawings representing the fitting to

²⁸ *Foster Construction Co. et al. v. United States*, 193 Ct. Cl. 587, 435 F.2d 873 (1970).

²⁹ *Mann Construction Co.*, ENGBCA No. 76-109, 80-2 BCA ¶ 14,674.

³⁰ *J.E. Robertson Co. v. United States*, 194 Ct. Cl. 289, 437 F.2d 1360 (1971).

³¹ *Titan Atlantic Construction Corp.*, ASBCA No. 23588, 82-2 BCA ¶ 15,808.

³² *S&M Traylor Bros.*, ENGBCA No. 3878, 82-1 BCA ¶ 15,484.

be used for toilet waste connection (indicating that waste lines connected with the existing waste-vent pipe).³³

While it might appear straightforward when implied indications exist in the design category, a review of selected decisions with negative findings only serves to confuse the inquisitive contractor. Examples where a court or board of contract appeals has determined that no indications existed:

1. design drawings which were stylized sketches showing some design information and location relationships, but were essentially performance type specifications, and not specific representations as to the physical conditions;³⁴ and

2. excavation labeled "unclassified" because the presence of lava rock could have been ascertained by a reasonable site investigation.³⁵

Therefore the design details should be scrutinized when determining whether an indication is present, and they should be interpreted in a manner which gives a reasonable meaning to all parts of the whole agreement as opposed to a meaning

³³ Kos-Kam Inc., ASBCA No. 34037, 88-3 BCA ¶ 21,100.

³⁴ Sierra-Pacific Builders, AGBCA No. 78-161, 80-2 BCA ¶ 14,609.

³⁵ COVCO Hawaii Corp., ASBCA No. 26901, 83-2 BCA ¶ 16,554.

which leaves one portion meaningless.³⁶

The third category of information occurs when the Government provides documentation concerning the site conditions in the solicitation but cautions bidders that this information is "not a part of the contract". This cautionary language often results in perplexing situations for bidders. This issue will be discussed in the chapter entitled Government Disclaimers.

What must be consulted by a contractor? There have been situations in which indications have been received by prospective contractors via external sources. These sources of information are above and beyond what the contractor is required to review. There is no duty to utilize or consult these sources. Purely external sources must be differentiated from indications that may be reasonably inferred. These latter inferences are termed implied indications.

Implied indications may result from publicly available information not included or referred to in the contract. Often in the scramble to obtain the maximum amount of information on a particular project, a potential bidder will

³⁶ *Ottinger v. U.S.*, 145 Ct. Cl. 638, 641, 172 F. Supp. 682, (1959) "The contract ... should be read as a harmonious whole if it is reasonably possible to do so. It is not to be supposed that he who drew the specifications intended one thing at one time, and a contradictory thing at another."

refer to external, non-contractual documents. The contractor can not successfully rely on external sources in a subsequent claim under the Differing Site Conditions clause. While a superficial analysis of this rule might result in a conclusion that it is fair, a contractor who attempts this additional research might end up with a dilemma: if the external information warns him of a condition he ultimately encounters—it may undercut his subsequent attempts to establish that his reliance on indications in the contract documents was reasonable.³⁷ In Umpqua River Navigation Co. v. Crescent City Harbor District, the contractor's pre-bid borings and his reliance on his own testing barred his later differing site conditions claim.³⁸ Such misplaced reliance on extraneous documents may serve to diminish if not defeat a claim for recovery. Therefore, a contractor must be wary and avoid intentional as well as inadvertent reviews of sources that are not a part of the "Government package".

This situation commonly arises when the contractor has previously worked on the same or similar land. In Stuyvesant Dredging Co., the contractor relied on his prior knowledge

³⁷ Ruttinger, *supra* note 21 at 73.

³⁸ Umpqua River Navigation Co. v. Crescent City Harbor District, 618 F.2d at 588, 595 (9th Cir. 1980).

when formulating his bid; when the site turned out to be different than he anticipated, he was not able to prevail on a Differing Site conditions claim.³⁹ Therefore it may be difficult to differentiate between express and implied indications.

C. INDICATIONS

The bid documents or the contract must contain "reasonably plain or positive indications" that subsurface conditions differ from what the contractor actually encountered.⁴⁰ The indications in the contract need neither be explicit nor specific; all that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect subsurface or latent physical conditions which are subsequently encountered

³⁹ *Stuyvesant Dredging Co. v. the United States*, 11 Cl. Ct. 853, aff'd., 834 F.2d 1576 (Fed. Cir. 1987).

⁴⁰ *Id.*, citing *P. J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916, (Fed. Cir. 1984). The requirement for "reasonably plain or positive indications" was not met by figures that were coupled with the provision that the figures represent the average value of the density readings taken within the range indicated.

at the site.⁴¹

Attempts by the courts and boards of contract appeals to define "contract indications" have not resulted in clear standards and parameters. The scope of the word "indicated" depends upon the interpretation of the contract.⁴² Classifying the definition of "indicated" is a matter of law, and it will be determined at the court's discretion.⁴³

While there must be some indications in the contract documents concerning conditions anticipated at the work site, these conditions do not have to be explicitly stated in a specific provision of the contract. The "contract indications" form the contractual baseline against which the subsurface conditions are to be measured.⁴⁴

Differing site condition claims have been rejected by contracting officers, boards of contract appeals, and courts on the basis that the contract documents did not indicate any

⁴¹ Supra note 28 at 881.

⁴² Dawco Construction, Inc., v. United States, 18 Cl. Ct. 682, (Cl. Ct. 1989), aff'd in part, rev'd in part, 930 F.2d 872 (Fed Cir 1991).

⁴³ J.F. Shea Co. v. United States, 4 Cl. Ct. 46, 51 (1983), aff'd., 754 F.2d 338 (Fed. Cir. 1985).

⁴⁴ Ruttinger, supra note 21 at 68.

site or subsurface conditions at all. When a contract is totally silent as to a particular condition, there can be no type I differing site condition.⁴⁵ In Type I cases there must be some indication in the contract that certain conditions would be present. There are several ways that a reasonably prudent contractor can infer that there is an indication present. The successful contractor, in order to prevail, must find the "hint" in the contractual document, and convince the Contracting Officer or the forum that it constituted an express or implied indication.

I. Express Indications

Relatively few cases have lengthy discussions as to express indications vis-a-vis implied indications. The Court of Claims in Pacific Alaska Contractors, Inc. v. United States, has stated: "There must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found."⁴⁶ Therefore the critical issue is determining what is sufficient to constitute this "reasonably plain or positive indications" requirement. Generalizations,

⁴⁵ Tricon Triangle Contractors, ENG BCA No. 5113, 88-1 BCA ¶ 20,317.

⁴⁶ Pacific Alaska Contractors, Inc. v. United States, 193 Ct. Cl. 850, 436 F.2d 461, 469 (1971).

even concerning such a seemingly straightforward area such as express indications, are risky at best. Each decision referencing Differing Site Conditions clause is dependent upon the facts and circumstances of the particular case.⁴⁷

Express indications range from the general -- outlining broad conditions -- to the specific. As an example of the latter, in Peabody N.E., Inc. the ASBCA held that Invitation for Bids (IFB) drawings demonstrating the depth of concrete to be removed to be within certain limits, coupled with a stated, specific aggregate square footage of repairs constituted an express indication.⁴⁸

II Implied Indications

The importance of the concept of "implied indications" should be stressed. Relief may hinge on whether the contractor can prove that there was in fact an implied indication. The Government defense in these cases is often that the contract is silent as to the specific condition which the contractor allegedly used for the computation of his bid. If this initial defense is successful, the contractor may be

⁴⁷ Hydromar Corporation of Delaware and Eastern Seaboard Pile Driving, Inc., ENG BCA No. 4827, 89-3 BCA ¶ 21,898, citing S.T.G. Construction Co. v. U.S., 157 Ct. Cl. 409, 415 (1962).

⁴⁸ Peabody N.E., Inc., ASBCA No. 26410, 85-1 BCA ¶ 17,866.

forced to attempt to recover under the more difficult standards of a Type II Differing Site Condition.

Often the implied indications can be characterized as uncertain or ambiguous. The cases in this area are very noteworthy, because they demonstrate what kinds of contractual contentions do not rise to the level of "implied indications". Contractors have been frustrated by this aspect of the clause:

1. A contractor experienced increased excavation as the result of connecting sewer piping which was present at a greater depth than anticipated. The claim was denied as the average depth of connections found on the drawings did not indicate the actual depths of the existing building service laterals at their point of connection to other laterals;⁴⁹

2. Additional expenses incurred in removing welded wire mesh from the lightweight insulating concrete in a roof resulted in a denied claim as the contents of the concrete were not indicated.⁵⁰ However, provided to the contractor was a detailed drawing containing a "material legend" showing "symbolic illustrations" to include the material parts of the structure. The detailed drawings depicted cross sections of

⁴⁹ Sandwich Islands Construction, Inc., ASBCA No. 35244, 88-3 BCA ¶ 21,143.

⁵⁰ Union Roofing and Sheet Metal Company, Inc., PSBCA No. 2366, 90-1 BCA ¶ 22,505.

the existing roof showing materials in the aggregate from the top of the roof down to the steel deck. The contract also contained detailed information on the structural and material composition of the roof. However, the dissent in this appeal concluded that there were no implied indications that the concrete had no wire mesh, stressing that the burden of proof for a Type I claim is less onerous; the board maintained that all that is required is "that there be enough of an indication on the face of the contract documents";

3. Amounts which contractor actually removed by coring were greater than the Government's identification of the amount of "hard material", even though contractor anticipated that only a portion of the hard material would require removal by coring. The contractor's claim was denied because there was no indication of how much of the hard material would require coring;⁵¹ and

4. Additional expenses in providing furring around the outside of some of the windows to be replaced were not allowable because the contractor was required to verify all dimensions but he assumed that the second and first floor windows were the same. The claim was denied because contract documents did not impliedly indicate that the depths of the

⁵¹ M.A. Mortenson Company, ASBCA No. 31903, 90-1 BCA ¶ 22,313.

windows were identical.⁵²

The ASBCA has repeatedly cited the test for implied indications as set out in Reliance Enterprises: to obtain relief, the indication must have been reasonably inferable from the contract documents, on which a reasonable contractor can be expected to rely.⁵³ There seems to be no discernable pattern of analysis when viewing the cases and appeals highlighting the contractor's rejected arguments.

The cases and appeals show that it is difficult to prognosticate what the courts and boards of contract appeals will require in order to find an "implied indication". However, some generalizations can be made.

An indication need not be a positive statement or representation; it may be proven by inferences or implications.⁵⁴ It is sufficient to justify relief if indications concerning expected conditions at the work site

⁵² Insul-Glass, Inc., ASBCA No. 33577, 89-3 BCA ¶ 22,033.

⁵³ Reliance Enterprise, ASBCA Nos. 27638, 27639, 85-2 BCA ¶ 18,045.

⁵⁴ Supra note 28 at 881. "The causes of an erroneous indication in the contract-whether simple error, negligence or other-are no longer important. An 'indication' may be proven, moreover, by inferences and implications which need not meet the test for a 'misrepresentation' or 'representation,' concepts which have a long common law history associated with fraud."

can be established from such reasonable inferences and implications as can be drawn from the contract documents.⁵⁵ Indications of the conditions to be expected may be implicit in specifications or project designs, or may be implicit in the contract when read as a whole.

D. MATERIALITY

To prevail on a claim for differing site conditions, the contractor must prove, by a preponderance of the evidence, "that the conditions indicated in the contract differ materially from those it encounters during performance".⁵⁶ Some examples of this "differing materially" requirement are more obvious than others. For example, where underwater loose silt was twenty rather than five feet deep, causing the contractor's tripod to sink out of sight, the Department of Transportation Board of Contract Appeals (DOT BCA) held that the Contractor was entitled to additional compensation for the

⁵⁵ *Ruttinger*, *supra* note 21 at 13.

⁵⁶ *Arundel Corp. v. United States*, 207 Ct. Cl. 84, 515 F.2d 1116, 1128 (1975).

reasonable costs in overcoming the condition.⁵⁷

When the courts and boards of contract appeals examine the issue as to whether the physical conditions are differing materially from those indicated in the contract, an important area of inquiry is the determination of what the contract indicates.⁵⁸ An accurate appreciation of what constitutes an express or implied indication can only be gained by examining the specific treatment accorded to the different categories by the boards of contract appeals and courts. The contractor has the difficult task of establishing a baseline, a point of reference, for a comparison of the indications that are found in the contract with the actual physical conditions encountered. Surprisingly, very few cases discuss this comparison or make any references to what constitutes a material difference.

The uncertainty increases as there is little guidance as to precisely what will constitute a material difference. This compounds the difficulty of determining what degree of

⁵⁷ Coastal Structures, Inc., DOTCAB No. 1670, 88-3 ¶ 20,955.

⁵⁸ Granite-Groves v. Washington Area Metropolitan Transit Auth., 845 F.2d 330 (D.C. Cir. 1988) (contractor encountered substantial amounts of sand and water instead of dry clay at two locations; Type I condition found because although contract documents disclosed sand and water at one location, lack of disclosure at other implied its non-existence).

difference is essential to sustain a Differing Site Conditions allegation. The contractor must properly identify the pertinent information available; he must also ascertain whether the information is a complete representation by itself and whether the difference is substantial enough to reach the "material" standard.

E. RELIANCE

Contractual descriptions constitute positive representations of the nature of the conditions of the work to be performed. The nature of the project, such as the details of excavation or construction work, may represent the physical conditions. Contractual documents evaluated together must result in a finding of materially different indications, which provide a basis for the contractor to rely on his reasonable interpretation of those conditions.

Several factors must be considered by the courts and boards of contract appeals when determining whether the contractor's reliance was reasonable. The court must view itself as a reasonable and prudent contractor and decide whether the site condition was reasonably unforeseeable at the time of the bidding, in light of all then available

knowledge.⁵⁹

A contractor should always be aware of the standard against which he will be held. The standard of expertise, coupled with the permissible interpretations, form the basis for the determination of whether the contractor's reliance is warranted. The threshold requirement is that the Government contractor's reliance must be at a level comparable to those of a reasonably prudent contractor. However, this "reasonably prudent" standard is based on those of the particular industry; for instance in a contract for the drilling of production water wells, the Claims Court in McCormick Construction Co. v. United States held that the contractor must interpret the indications as would a "reasonably competent water driller".⁶⁰ There is no requirement for a bidder to exercise the competence of a trained geologist or

⁵⁹ CCM Corporation v. United States, No. 599-86C, 1990 WL 78846, (Cl. Ct.), June 8, 1990, citing Stuyvesant, *supra* note 39.

⁶⁰ McCormick Construction Company, 18 Cl. Ct. 259 (Cl. Ct. 1989). The court concluded that a competent water driller would have made a site inspection which would have revealed that the worksite was located on an "alluvial fan" consisting principally of boulders, rock and gravel.

botanist.⁶¹ Therefore the contractor is not required to possess the knowledge of a scientific expert when formulating his bid.

There are other problems surrounding the Government representations impacting the reliance issue. Physical conditions indicated in the contract have logical limitations both as to their accuracy and to the physical area; reliance must not extend past the physical area or the area of accuracy.⁶² Detailed, post hoc computations are well beyond the duties incumbent upon a reasonable bidder.⁶³

Characterizations of contract indications are important because the Government often attempts to overcome the contractor's assertion of reasonable reliance upon a Government representation. The more positive the form of the representation and the greater the appearance that the matter represented is one which should be within the knowledge of the Government, the greater the Government's difficulty will be

⁶¹ *Kaiser Industries Corp. v. United States*, 169 Ct. Cl. 310, 340 F.2d 322, 330 (1965); *Kinetic Builders*, ASBCA No. 32627, 88-2 BCA ¶ 20,657.

⁶² *McClure*, supra note 16 at 153, "These areas need to be defined in the event that actual conditions later prove to differ materially within these areas."

⁶³ *Holloway Construction Company*, ENG BCA No. 4805, 89-2 BCA ¶ 21,713.

in overcoming a finding of a contractor's reasonable reliance.

The exact area of reliance is often elusive.

Generally, when contract documents refer to information that is readily available to the bidder, a bidder is obligated to consult such information, and he incurs the risk of not referring to such material. The first factor involving the characterization of the area is the conditions represented, as a contractor can only rely on positive, expressed representations and those representations that are reasonably implied in the contract documents.⁶⁴

As for the second factor in determining reasonable reliance, the Government warrants the accuracy of positive express representations as to physical conditions. This warranty does not extend to all implications and inferences. It appears that the stronger the implied indication in the contract, the more likely that the contractor's reliance will be termed reasonable. It is well settled that this requirement of reasonable reliance may be negated not only by that information of which the contractor has actual knowledge, but also by that information of which he should have known.

The precise extent of the area that is represented by physical data is difficult to determine, and this difficulty

⁶⁴ McClure, *supra* note 16 at 154.

has resulted in inconsistent decisions. No set standards exist to define the "area of reliance" forcing the potential contractor to speculate as to the quantitative amounts of any difference between what was encountered and what should have been expected, as well as how far from the boring cylinder that the Government will warrant the conditions. The "area of reliance" has ranged from directly within the boring cylinder of a soil sample,⁶⁵ to a ten foot radius of the cylinder.⁶⁶ It has been extended to include conditions throughout the entire construction site.⁶⁷ The problems associated with determining the precise area of reliance are obvious. For example, the Government may take ten randomly spaced borings in a three-acre lot--as a result, a ten-ton, six hundred cubic foot granite mass may go undetected. In

⁶⁵ Maurice Mandel, Inc. v. United States, 424 F.2d 1252 (8th Cir. 1970).

⁶⁶ Morrison-Knudsen Co. v. United States, 170 Ct. Cl. 712, 345 F.2d 535 (1965).

⁶⁷ See Stuyvesant, *supra* note 39, "Moreover the averages were shown for only six specified locations in a channel that was 600-700 feet wide and almost four miles long. They provided a totally inadequate basis for any generalization regarding the character of the material to be removed from the channel."

Accent General, Inc.,⁶⁸ the ASBCA sustained a contractor's claim when a test boring thirty-four feet away from the condition encountered did not indicate the presence of rocks or stones at any level. The Government unsuccessfully argued that the specification and configuration of the rock pierhead was unknown, and that it was not reasonable to anticipate that none of the rocks sunk to a different level. The distance to and around a boring for reliance purposes can only be predicted by using vague notions of reasonableness. Cases and appeals have cited various distances around a boring which may be considered as falling within the indications shown in the boring log.⁶⁹ Consequently, another problem with the Differing Site Conditions clause derives from the fact that the precise "area of reliance" surrounding soil borings is uncertain.

The third factor in determining the appropriate area of reliance hinges on the Government representation. The

⁶⁸ Accent General, Inc., ASBCA No. 28813, 87-2 BCA ¶ 19,689. But see McCormick, *supra* note 60 (contractor not entitled to rely solely on boring logs, as experienced contractors should know that alluvial conditions limit reliability of test boring logs).

⁶⁹ Framlau Corporation, ASBCA No. 14025 et al., 71-2 BCA ¶ 8,989, where it was held that test borings made as far as 170 feet from the location at which rock was encountered were sufficiently close to represent an indication of subsurface conditions.

Differing Site Conditions clause does not require proof of Government fault in authoring the contract documents, and eliminates the factual elements required to prove a misrepresentation. Soon after the inception of the Differing Site Conditions clause, the Court of Claims explained the difference between a claim for breach of contract due to misrepresentation and a claim for a Type I differing site condition. For a differing site condition claim it is only necessary to prove that the actual conditions encountered materially differ from those shown or indicated on the plans or specifications.

Therefore, the requirement for reasonable reliance is fulfilled when the contractor can demonstrate that the subsurface conditions would be more favorable than those encountered.⁷⁰

F. GOVERNMENT CLAIMS

While the Differing Site Conditions Clause allows for either side to assert it, the few cases involving the Government advancing the clause are Type I cases, therefore they are reported here.

⁷⁰ Servidone Construction Corp., 19 Cl. Ct. at 359-60, 1990 WL 89040.

The principles and parameters described above apply equally to the situation when the Government attempts to use the Differing Site Conditions Clause to obtain a price reduction. There are very few cases in which the Government has asserted the Differing Site Conditions Clause for this purpose. Various authors have noted that the Differing Site Conditions Clause is rarely invoked by the Government; the great majority of Government claims against contractors arise from six other standard contract clauses included in virtually every Government contract.⁷¹

Since there are so few published decisions based on Government claims using the Differing Site Conditions Clause, it is difficult to make an informed analysis. In one instance, the Veterans Administration Board of Contract Appeals sustained the Government's counter-claim based upon an actual underrun.⁷² The Government had specified removal of a rock quantity of 270 cubic yards, and appellant actually removed 102 cubic yards of rock overall. While the appellant

⁷¹ Lantham, *Government Contract Disputes*, 2d Ed, paragraph 8-4. "There are six principal contract adjustment provisions that the Government may use as a contract remedy (citing Defective Cost or Pricing Data, Cost Accounting Standards, Changes, Defective Work, Liquidated Damages and Termination)."

⁷² AFGO Engineering Corporation, VACAB No. 1236, 79-2 BCA ¶ 13,900.

argued that the Veterans Administration should not be permitted to use the faulty estimate as a basis for invoking the Differing Site Conditions Clause, the board held an accurate estimate of the rock quality was not feasible and a 62% underrun was not reasonably foreseeable. In Perini Co. v. U.S., the Court of Claims noted that the Government grossly understated the estimated quantities and attempted to use the changed conditions clause to afford relief.⁷³ Consequently, the Court of Claims held that the Government should not be entitled to use its faulty estimate as a basis for relief since it was never the purpose of the clause to protect a party from its own miscalculations.

In a very recent decision, the ASBCA denied the Government request for relief in the nature of a reduction in the contract price. In M. A. Mortenson Company, a contractor asserted a Type I differing site condition claim based on an allegation of additional amounts of subsurface rock.⁷⁴ The Government counterclaim alleged that the bedrock was closer to the surface than was expected; and that this should cause a reduction in the foundational drilling cost. The ASBCA stressed that an actual reduction in total cost was required

⁷³ Perini Corporation v. United States, 180 Ct. Cl. 768, 381 F.2d 403 (1967).

⁷⁴ Supra note 51.

prior to a reduction for the Government under the Differing Site Conditions clause.

The lack of cases referencing a Government assertion of Differing Site Conditions claims is troubling. The Differing Site Conditions clause as well as the predecessor clause was designed to be a two way street. However, Government reductions have probably been thwarted by the contractor's failure to give the Government the requisite written notice of a differing site condition.

In addition, the few recorded claims by the Government for differing site conditions allegations could indicate that Government contract employees are either unaware of the procedure, unwilling to explore the possibility of it, or afraid of being incorrect in their assertion of it.

G. CONCLUSION

The courts and boards of contract appeals are inundated with differing site conditions claims. While the Type I condition claims are thought to be easier to prove, the stumbling blocks are rampant. The CAFC recently issued two different decisions within a short time span concerning Type I differing site conditions. Since this court is the appellate authority for both the U.S. Claims Court and the

Boards of Contract Appeals, the decisions merit close scrutiny. In 1987, Stuyvesant Dredging Co. v. United States, the CAFC affirmed the U.S. Claims Court and identified the three elements that must be met in order to establish a Type I claim.⁷⁵ The right to an equitable adjustment is based on the following:

1. that the conditions encountered by plaintiff differed materially from those indicated in the contract documents;
2. that the differing condition could not have been reasonably anticipated from the site examination and review of the contract drawings; and
3. that plaintiff relied on its interpretation of the contract drawings.⁷⁶

Realizing that the Differing Site Conditions clause is not a new phenomenon, one year later, the same court again affirmed the U.S. Claims Court in Weeks Dredging and Contracting, Inc. v. United States, but determined that there are six elements essential to successfully sustain a differing

⁷⁵ Supra note 39.

⁷⁶ Supra note 39.

site condition claim.⁷⁷ Therefore, to receive an equitable adjustment:

1. the contract documents must have affirmatively indicated or represented the subsurface conditions which form the basis of the plaintiff's claim;

2. the contractor must have acted as a reasonably prudent contractor in interpreting the contract documents;

3. the contractor must have reasonably relied on the indications of subsurface conditions in the contract;

4. the subsurface conditions actually encountered, within the contract site area, must have differed materially from the subsurface conditions indicated in the same contract area;

5. the actual subsurface conditions encountered must have been reasonably unforeseeable; and

6. the contractor's claimed excess costs must be shown to be solely attributable to the materially different subsurface conditions within the contract site.⁷⁸

Seemingly, each segment of the clause offers its own trap along with the possibility of a different distinction.

⁷⁷ Weeks Dredging and Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987), aff'd, 861 F.2d 728 (Fed. Cir. 1988).

⁷⁸ *Id.*

Therefore, in order to assess the chances of prevailing on a differing site conditions claim, it is necessary to break out each element of proof that is required. In line with the CAFC's expansion of the elements necessary to substantiate a differing site conditions claim, this author suggests that there are twelve necessary elements in a successful Type I differing site conditions claim. At a minimum, the contractor must be able to prove that:

1. there was an indication of a condition,
2. the indication was a part of the contract documents,
3. the indication differed from what was encountered,
4. the difference was material,
5. the contractor reasonably relied on the indication,
6. the contractor performed a reasonable and thorough site inspection,
7. the contractor asked all of the necessary and relevant questions to clear up any inconsistencies or ambiguities,
8. the conditions were subsurface or latent,
9. the conditions were physical,
10. the notice was prompt, written and conveyed before the conditions were disturbed,
11. the contractor sustained damages, and
12. the amount of damages is appropriately computed and

proven.

If the reasonably-prudent contractor believes that his case satisfies these twelve considerations, there might be some value in pursuing the differing site conditions Type I claim. The intricacies and factual distinctions involved in each of these twelve concerns are, however, often complex. Contractors are uncertain whether they are protected against increased costs should the subsurface conditions vary in any material nature from that which was represented in their contracts.⁷⁹ If the Differing Site Conditions clause is not providing consistent protection from contingencies and risks, then the purpose of the clause is not being fulfilled.

⁷⁹ Goetz, "Differing Site Conditions Clauses: Is the Contractor Protected?", in *Builder and Contractor*, June 1988, Vol. 36, No. 6 at 54.

CHAPTER 3

TYPE II CONDITIONS

A. OVERVIEW

While Type I differing site conditions focus on actualities differing from contract indications, FAR 52.236-2 Differing Site Conditions (April 1984) defines the second category of differing site conditions as an unknown physical condition at the site, of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract. Finding a Type II differing site condition is not predicated on the existence of a material difference between conditions encountered and conditions indicated in the contract.

Type II conditions, however, are less frequently the subject of litigation than Type I, due to the fact that some representations are usually made in the contract.⁸⁰ There are

⁸⁰ McClure, *supra* note 16 at 143.

more difficulties with proving these conditions: the Type II conditions are not as easily resolved due to the "unknown" and "unusual" requirements being a predicate of recovery, and in addition, materiality or degree of physical difference becomes a subjective decision.⁸¹ Since the contract is silent as to the conditions to be encountered, knowledge must be acquired by other means.

The burden of proving a Type II condition is consistently described by courts and boards of contract appeals as "heavy". The basis for a comparison (between the known and unknown or usual with the unusual) of a Type II condition is more amorphous, than that for a Type I condition.⁸² The court or board of contract appeals must determine what physical conditions would be reasonably expected in the type of work or the place described in the contract and whether the conditions actually encountered at the site were in fact, materially different from those that should have been

⁸¹ Chambers, "Differing Site Conditions, Contractual and Common Law Remedies" in *Builder and Contractor*, February 1988, Vol. 36, No. 2 at 12.

⁸² *Husman Brothers, Inc.*, DOTCAB No. 71-15, 73-1 BCA ¶ 9,889 (1973).

expected.⁸³ In Type II differing site condition cases there is no "baseline" which can be obtained from the contract documents.

To demonstrate the difficulties inherent in proving the Type II differing site condition, countless cases have cited the seminal Court of Claims case -- Charles T. Parker Construction Co. v. United States:

A Government construction contractor seeking to establish a "category two" changed condition is confronted with a heavy burden of proof ... the Government has elected not to presurvey and represent the subsurface conditions with the result that the claimant must demonstrate that he has encountered something materially different from the "known" and the "usual". This is necessarily a stiffer test because of the wide variety of materials ordinarily encountered when excavating in the earth's crust.⁸⁴

While the concepts involved with proving a Type II differing site condition might seem relatively simple, a review of the cases reveals the different standards which the courts and boards of contract appeals impose. While the

⁸³ Chambers, *supra* note 81.

⁸⁴ *Charles T. Parker Construction Co. v. United States*, 193 Ct. Cl. 320, 433 F.2d 771 (1970).

contractor is required to possess the knowledge of the ordinary and usual conditions for the particular area, the DOT BCA in Husman Brothers, Inc. determined that the contractor must consider pertinent climatological, hydrological, and geological data and all other relevant and probative evidence about the geographical area involved.⁸⁵

Type II litigation can be a long and expensive process; evidentiary hearings may result in experts testifying that the physical conditions were either common to the geographical area and inherent in the work, or that the conditions were so different and unusual that an equitable adjustment for cost and delays is well justified.⁸⁶ If the conditions are determined to be known and usual, the court or board of contract appeals is likely to reiterate the language used in Parker. The appellant has the relatively heavy burden of proving that he encountered conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of that character.⁸⁷

⁸⁵ *Supra* note 82.

⁸⁶ *Chambers*, *supra* note 81.

⁸⁷ *Kent Nowlin Construction, Inc.*, ENG BCA No. 4681, 87-3 BCA ¶ 20,147.

B. GOVERNMENT NON-DISCLOSURE

The complexity and confusion surrounding the Differing Site Conditions clause is exacerbated when the Government fails to disclose relevant information. Often a contractor will allege, in the alternative, that the Government did not disclose relevant, pertinent information. While a separate discussion of the Government's duty to disclose superior knowledge is found in Chapter 9, the Government's non-disclosure is particularly relevant in the context of Type II differing site conditions. The most difficult cases for the Government to win occur when the Government has knowledge of a condition, but fails to disclose this information to the bidders. These are situations where only the Government knows some critical facts which are neither known nor available to the industry, a prospective bidder cannot obtain these facts from sources outside the Government, and the Government withholds the facts from the contractor.⁸⁸ However, the contractor would have difficulty asserting the Government's non-disclosure with respect to existing physical conditions of an ordinary nature, that are

⁸⁸ Santa Fe Engineers, Inc., ASBCA No. 17235, 75-2 BCA ¶ 11,570.

open to pre-bid inspection.⁸⁹

The duty to disclose "superior knowledge" is not a precise requirement, judging from several recent decisions. Historically, the ASBCA has held that when the Government does not provide contractual information on site conditions, the contractor has an increased responsibility to conduct a more detailed site investigation.⁹⁰ In situations where the contractor conducted a reasonable site investigation and the Government withheld superior knowledge from the contractor regarding conditions which were not susceptible to discovery upon inspection, the superior knowledge doctrine entitled the contractor to additional compensation.⁹¹

In one peculiar set of cases involving Government experience at the same site, the ASBCA denied a claim when the Government knew and did not disclose that previous contractors had experienced the same type of problem at the same work

⁸⁹ Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 458 F.2d 1364 (1972) .

⁹⁰ Medsger, "Category II Differing Site Conditions in Government Contracts," DA PAM 27-50-186, June 1988, 10, 12, citing Commercial Mechanical Contractors, Inc., ASBCA No. 25695, 83-2 BCA ¶ 16,768, "The rationale is that by not being provided any information, the contractor must gather its own information to ascertain the site conditions."

⁹¹ Supra note 66.

site. The controlling rationale was that there was no rule requiring the Government to include in the solicitation a summary of all claims on similar projects in the same geographic area.⁹² However, two years after the decision was affirmed on reconsideration, another appeal was filed by a different contractor at the same site. However, in the latter appeal, even though two of the same judges were on both appeals, the ASBCA sustained the claim stating that the Government reasonably and in good conscience should have disclosed the problems previously encountered.⁹³

C. UNKNOWN/UNUSUAL

One of the main barriers to a successful Type II claim is to prove what constitutes the unknown and the unusual. What might appear out of the ordinary and unforeseeable to the contractor might appear very normal and usual to the Government.

In order to establish that the condition was unknown to

⁹² Medsger, *supra* note 102 at 14, citing James E. McFadden, ASBCA No. 19931, 76-2 BCA ¶ 11,983, aff'd on reconsideration, 79-2 BCA ¶ 13,928.

⁹³ Joseph A. Cairone, Inc., ASBCA No. 20504, 81-2 BCA ¶ 15,220.

the contractor it must be proved that it could not have been reasonably anticipated by the contractor from a study of the contract documents, or from a site investigation or even from the general experience of the contractor; the test proves to be both objective and subjective - that the contractor knew or should have known of the existence of the condition.⁹⁴ Therefore determining whether the condition was unknown *vel non* is a formidable obstacle, *in and of itself*.

Not all "right-thinking" minds agree as to what is unusual. To the extent that boards of contract appeals and courts must find the site condition "unusual", it is more difficult to prognosticate the outcome of Type II differing site conditions disputes. Several cases and appeals involving Type II differing site conditions focus on the requirement that the condition be unusual.⁹⁵ The condition does not have

⁹⁴ Medsger, *supra* note 90.

⁹⁵ *Community Power Suction Furnace Cleaning Co., ASBCA No. 13803*, 69-2 BCA ¶ 7,963. In this case, the "unusual" requirement was not applied with regard to the specific and common attributes of an enlisted barracks at a U.S. Army fort. The ASBCA acknowledged that the contractor was not familiar with military establishments, but nevertheless decided that the contractor could not have anticipated finding the wide variety of items. "The variety ranged from beer cans and jars of jam to gunpowder, live ammunition and ladies' underwear described as in a deplorable condition." The Government unsuccessfully argued that extraneous material in the heating ducts must be anticipated in military barracks.

to be a geological freak of nature, such as permafrost in the tropics, to qualify as being unusual.⁹⁶ The condition must differ materially from what was reasonably anticipated. When the Government gives no indications, there is normally no consensus as to what is "usual". Therefore, reasonable expectations may differ as to what is foreseeable.

The knowledge required of the contractor is both general and specific. The contractor must possess the general knowledge of the geographical area, a determination that cannot be made in the abstract.⁹⁷ Contractors must objectively know only that which a similarly-situated contractor would have known, not what an expert would have been able to ascertain.⁹⁸ However, if certain conditions are prevalent in the locale, the contractor must assess the likelihood of the presence of the conditions and determine whether to increase his bid. In some cases, the contractor may include a

⁹⁶ *Western Well Drilling v. United States*, 96 F. Supp. 377 (Cal. 1951).

⁹⁷ *Supra* note 82, "We must consider pertinent climatological, hydrological, and geological data and all other relevant and probative evidence about the geographical area involved."

⁹⁸ *Medsger*, *supra* note 90, citing *Blake Construction Co., and U.S. Industries, A Joint Venture*, ASBCA No. 20747, 83-1 BCA ¶ 16,410.

contingency factor in his bid when no representations or indications of conditions are available to rely on.⁹⁹ Padding bids due to contingencies, however, is inconsistent with the underlying purpose of the Differing Site Conditions clause. The Type II differing site conditions claim is successful when subsequent to an examination of the contract documents and a reasonable site investigation, the condition could not reasonably be anticipated by the contractor.¹⁰⁰ Therefore, the contractor must be perspicacious as to the factors that the boards of contract appeals and courts use to satisfy questions as what constitutes the "known" and "usual", so as to infer what is unknown and unusual.

Most appeals are neither obvious nor easy for the boards of contract appeals and courts to decide; consequently there are few trends that are apparent upon review of the fact finders' decisions. Decisions should be rendered strictly on the evidence presented on the various issues outlined above. However, some decisions appear to take an equitable approach with the result being that only certain conditions are characterized as unknown and unusual, warranting recovery.

⁹⁹ McClure, *supra* note 16 at 163.

¹⁰⁰ John C. Grimberg Company, Inc., ASBCA No. 15218, 73-1 BCA ¶ 9,785.

In Hydro-Dredge Corporation, the Corps of Engineers Board of Contract Appeals (ENG BCA) determined that in Hyannis Harbor, Massachusetts, thick eel grass was considered a Type II differing site condition, while a sunken sailboat was not.¹⁰¹ The board of contract appeals found that the amount of eel grass was unknown and unusual, but that the sunken sailboat debris should have been anticipated. Even though the decision was based on the finding that the amount of eel grass was an anomaly, while there was some knowledge of wrecked boats in the area, it seems as if the board made a superficial Type II analysis, which was limited to summarily determining what the contractor should have anticipated.

D. DIFFERING MATERIALLY

Courts and boards of contract appeals recognize that additional evidence is necessary to prove the Type II condition claim, as compared to the Type I condition claim: The claimant's assertion that he encountered something materially different from the known and usual necessarily results in a Type II differing site condition claim being even less predictable than a Type I claim. It is often stressed

¹⁰¹ Hydro-Dredge Corporation, ENG BCA No. 5303, 90-1 BCA ¶ 22,370.

that a contractor asserting a Type II differing site condition claim is confronted with a relatively heavy burden of proof.¹⁰² The inexperienced contractor is not relieved of the requirement to possess the common knowledge of the geographical area that other contractors possess.¹⁰³ Therefore, the informed contractor needs to be generally familiar with the area as well as other customs and assumptions in order to prepare a competitive bid.

The difficulty with demonstrating what is "... something materially different..." is apparent. The proof required for the entitlement to relief for Type II conditions is a basis of comparison which is amorphous and vague, and without a reference point in the contract.¹⁰⁴ Therefore, Type II differing site conditions claims are similar to Type I claims in that there is very little certainty provided by the clause. A comparison of the claimant's reasonable general expectations and of the claimant's actual conditions encountered is

¹⁰² Huntington Construction, Inc., ASBCA No. 33526, 89-3 BCA ¶ 22,150.

¹⁰³ McClure, *supra* note 16 at 162.

¹⁰⁴ *Id.* at 165.

required.¹⁰⁵ The claimant's evidence must demonstrate what is normally to be expected and that what was encountered was materially different from the norm.¹⁰⁶

When the Government describes the kind of work to be accomplished, the bidder must pay careful attention to the description of those requirements. The nature of the work should also put the contractor on notice that certain conditions are inherent in the type of work to be accomplished. The character of the work also helps to establish the ordinary and usual conditions which are expected to exist at the site.¹⁰⁷ The character of work must be scrutinized for the boards of contract appeals and courts to decide differing site conditions claims, for instance:

1. when the condition is an obstruction to the site's geographic area;¹⁰⁸

¹⁰⁵ Stuyvesant Dredging Company, ENG BCA No. 5558, 89-3 BCA ¶ 22,222.

¹⁰⁶ Guy F. Atkinson, ENG BCA No. 4693, 87-3 BCA ¶ 19,971.

¹⁰⁷ McClure, *supra* note 16 at 165.

¹⁰⁸ Medsger, *supra* note 90 at 16, citing Hurlen Construction Co., ASBCA No. 31069, 86-1 BCA ¶ 18,690 (loose cobbles are an anomaly in waters off Bangor, WA); Leider Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612 (subsurface solid rock was unusual to this area of New England); Robert D. Carpenter, Inc., ASBCA No. 22297, 79-1 BCA ¶ 13,675 (encountering a 5-11 inch concrete road slab was unexpected at Redstone Arsenal in Huntsville, Alabama).

2. when the condition is an obstruction that is located in a strange and uncommon location;¹⁰⁹

3. when the contractor was entitled to rely on the notion that federal buildings are usually maintained in a uniform manner according to rigorous specifications.¹¹⁰

4. when the magnitude of the conditions' effect on the performance of the contract was more than would normally be expected even though the contractor was aware of the condition;¹¹¹

5. when the condition is an unexplained phenomenon;¹¹² or

6. when the condition is not normally found in other

¹⁰⁹ Id., citing Unitech Inc., ASBCA No. 22025, 79-2 BCA ¶ 13,923, (sewer pipes under runway not normally expected).

¹¹⁰ Dawco Construction, Inc., ASBCA No. 32990, 88-2 BCA ¶ 20,606, aff'd., 867 F.2d 615 (Fed. Cir. 1989).

¹¹¹ Medsger, *supra* note 90 at 16, citing MC Co., ASBCA No. 21403, 78-2 BCA ¶ 13,313, (although contractor knew of high water content of soil, the speed at which it caused soil to deteriorate was unusual).

¹¹² Id., citing The Arthur Painting Co., ASBCA No. 20267, 76-1 BCA ¶ 11,854, (even after contractor removed old paint, additional old paint inexplicably peeled and lifted).

similar structures;¹¹³

In the aforementioned cases, the character of the work was cited as one of the factors which eventually resulted in the allowance of a differing site conditions claim.

However, differing site condition claims have been denied when one of the following facts are present:

1. the condition is common to structures or buildings constructed during a particular era, even though the contractor was not accustomed to the existence of the condition;¹¹⁴

2. the condition is subsurface water and the site is located near a large body of water;¹¹⁵

3. the condition is an obstruction in a customary

¹¹³ Medsger, *supra* note 102 at 16, citing Quiller Construction Co., ASBCA No. 25980, 84-1 BCA ¶ 16,998, (unusually thick plaster and tiles affixed to walls in unusual manner).

¹¹⁴ J. J. Barnes Construction Co., ASBCA No. 27876, 85-3 BCA ¶ 18,503. "However, as we have found, the condition of the buildings in this respect (out of plumb concrete columns and uneven floors) was not unusual and was to be expected in buildings constructed of the materials and in the manner that these were."

¹¹⁵ Fred A. Arnold Inc., ASBCA No. 20150, 84-3 BCA ¶ 17,624, (muddy soil encountered near reservoir).

location;¹¹⁶

4. the contractor has experienced the condition on similar projects;¹¹⁷

5. the condition is normal for the geographic area;¹¹⁸

6. the condition is common even though it is large for the area;¹¹⁹ or

7. the contractor knew that the material had been used in the past for previous repair work, even though it was not mentioned in the contract documents, and not encountered

¹¹⁶ Callaway Landscape, Inc., ASBCA No. 22546, 79-2 BCA ¶ 13,971, (normal to find underground utilities in housing areas).

¹¹⁷ C&L Construction Co., ASBCA No. 22953, 81-1 BCA ¶ 14,943, aff'd on reconsideration, 81-2 BCA ¶ 15,373 (contractor had performed at least 20 other contracts at this base and was aware of the propensity for subsurface water). See Stuyvesant, *supra* note 39. "Each Government contract stands by itself, however. Unless the Government advises contractors that conditions in different contracts are the same, a contractor acts at its peril if it assumes that what it learned in bidding on other contracts applies equally to a new contract."

¹¹⁸ *Supra* note 35, (subsurface lava beds common in Hawaii).

¹¹⁹ Lloyd Moore Construction, AGBCA Nos. 87-151-3 et al., 89-2 BCA ¶ 21,875.

during the site investigation.¹²⁰

E. CONCLUSION

While a comparison of the general differences between the cases in which claims were allowed and the cases in which claims were denied might result in limited predictability, it is still difficult to foresee which facts a forum would find dispositive. The lack of definition as to the precise factors that are controlling proves frustrating for both the contractor who must quickly prepare his bid, as well as the Government which must constantly defend against the contractors' assertions. In the Type II differing site condition the baseline for comparison purposes is something considerably more amorphous than in the Type I situation: namely, what would ordinarily be encountered in that general geographical area in performing work of that character.¹²¹

Many Type II cases and appeals have extensive discussions concerning the site investigations. A site investigation provides a vehicle for the conveyance of specific information concerning physical or work-site conditions. The clause,

¹²⁰ Supra note 42.

¹²¹ McClure, *supra* note 16 at 165.

"Site Investigation and Conditions Affecting The Work" (April 1984), FAR 52.236-3, requires the contractor to acknowledge that steps have been taken to ascertain the nature and location of the work, and that he has investigated the general and local conditions affecting the work or its cost. This clause must be inserted in the same contracts as the Differing Site Conditions clause. Since most of the determinations concerning site investigations are common to both types of differing site conditions, a more detailed discussion of site investigations is reserved for Chapter 5. To recover under the Differing Site Conditions clause, the "unknown" condition requirement necessitates that a reasonably thorough site investigation be conducted by the contractor. It is for the court or board of contract appeals to determine whether a reasonable site investigation was accomplished. The sufficiency of the site investigation is measured by what a reasonably-experienced, intelligent contractor should have discovered or anticipated.¹²²

¹²² Northwest Painting Service, Inc., ASBCA No. 27854, 84-2 BCA ¶ 17,474. Board denied contractor's claim of Type II differing site condition where sandblasting of a "soft" concrete surface caused more damage than contractor expected; rationale was that although the problem encountered was unexpected, it was not unusual.

CHAPTER 4

TYPES OF CONDITIONS AFFECTING RISK

Several aspects affect the relative standing and risks of the contracting parties. Thus, another layer of uncertainty concerning the use of the Differing Site Conditions clause is uncovered, in that there is no easy way to foretell which party assumes the risk of the occurrence. The absence of this predictability may argue that a contingency allowance in a bid might still be necessary despite the presence of a Differing Site Conditions clause. Bidders must be mindful of the range of potential factors that could change the risk assessment.

A. "PHYSICAL" REQUIREMENT

Contractor recovery in either type of differing site condition is contingent upon the existence and proof of a physical condition which differs materially either from the contract documents or from those conditions which are ordinarily encountered in the type of work required by the contract. "Physical" is defined as "of or related to natural or material things as opposed to things mental, moral,

spiritual or imaginary".¹²³ However, a more limited meaning of the term "physical" has been applied in differing site condition cases: the word "physical" has been interpreted to exclude conditions which are governmental, political, economic or even those conditions that approach what would commonly be thought of as physical. When deciding appeals generated by the Differing Site Conditions clause, various boards of contract appeals have held that conditions precipitated by a wide range of events are not physical conditions within the meaning of the Differing Site Conditions clause:

- 1) the possibility of a "potential extraneous event" consisting of the dangers posed by the Tet Offensive in the Republic of Vietnam in 1968;¹²⁴
- 2) mechanical failure of air conditioning affecting worker comfort;¹²⁵
- 3) escalation of component prices of materials purchased from a subcontractor;¹²⁶

¹²³ Webster's New International Unabridged Dictionary (3rd Rev. Ed. 1981).

¹²⁴ Keang Nam Enterprises, Ltd., ASBCA No. 13747, 69-1 BCA ¶ 7,705.

¹²⁵ George E. Jenson Contractors, Inc., GSBCA Nos. 3242, 3249, 71-1 BCA ¶ 8,735.

¹²⁶ Volpe Construction, Inc., ENG BCA No. 4457, 82-1 BCA ¶ 15,530.

- 4) labor disputes resulting in additional costs;¹²⁷ and
- 5) assault, injury, delay and damage resulting from mob violence.¹²⁸

The "physical" limitation is important so as to fulfill the "at the worksite" requirement. Since the "scope" of the worksite has not been clearly defined, decisions have alternated between granting and denying recovery under the differing site conditions clause for conditions encountered in rock quarries. In Kaiser Industries, the contractor was required to repair stone revetments in several locations.¹²⁹ The contract identified and made available without charge, two quarries (owned by the Government) as approved sources for the type of rock suitable for the project. The contract even cautioned that other quarry sources could not be used without the contracting officer's permission. Contractor selected one of the two quarries but was forced to abandon operations because he encountered over 60 percent waste. The contractor

¹²⁷ Bateson-Cheves Construction Co., IBCA No. 670-967, 68-2 BCA ¶ 7,167.

¹²⁸ Cross Construction Company, ENG BCA No. 3636, 79-1 BCA ¶ 13,708.

¹²⁹ Supra note 61, Kaiser, at 323.

exhausted the supply of suitable rock within the first few weeks of operations. As he continued it became increasingly difficult to locate suitable rock. Whatever rock he encountered shattered and crumbled; or was decayed and contained boulders.

Once the contractor moved to the other "approved" quarry he easily obtained the requisite quantity and quality of rock experiencing only a waste factor of 10 percent. In granting the contractor's claim the court reasoned that "plaintiff is entitled to an equitable adjustment under both parts of the Changed Conditions provision of the contract. The subsurface physical conditions at the site did differ materially from those indicated in the contract, and unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in quarrying operations, were encountered."¹³⁰

Years later however, in L.G. Everist Inc., the court concluded that a quarry was not considered "at the site" and denied recovery since it was not identified or mentioned in the contract.¹³¹ Under the terms of the contract the

¹³⁰ Id. at 336.

¹³¹ L.G. Everist Inc. v. United States 231 Ct. Cl. 1013, cert. denied, 461 U.S. 957, 103 S. Ct. 2428 (1983).

contractor was made solely responsible for the acquisition of rip rap required for the project. Since the quarry supplied a sufficient quantity and quality of rock, albeit at a higher cost than the contractor anticipated, this differential was not attributable to the Government. Citing the Kaiser Industries decision, the court acknowledged that sometimes conditions at quarries may be compensable when the use of a particular quarry is authorized and by necessity so bound up with the contractor's performance that the Government should be held responsible for conditions at the quarry.

However, the condition must also be static, not merely a physical interference at the worksite.¹³² Conditions at the worksite resulting exclusively from "Acts of God" generally are held to fall outside the coverage of the Differing Site Conditions clause; the conditions are excluded even though they are unusual, physical in character, and unanticipated.¹³³

¹³² Ames & Denning, ASBCA No. 6956, 1962 BCA ¶ 3,406.

¹³³ Peter Kiewit Sons' Company, IBCA No. 1789, 90-1 BCA ¶ 22,525. "In our Westlaw word search, we discovered that more than 800 Board of Contract Appeals cases since 1980 have at least mentioned the phrase, 'act of God' ... there was a period of time, mainly pre-1980, when there was little or no consistency among the cases as to the meaning of 'act of God'. By 'act of God' here, we mean a natural event causing adverse economic consequences that, because of its rarity, intensity, magnitude, location, duration, and/or time of occurrence, was not reasonably foreseeable. An act of God, in our view, must be something more than an ordinary natural occurrence at the time and place involved, and its adverse consequences must not be primarily attributable to anyone's negligence. In fact,

Since there is not normally an express assumption of the risk by the Government for an "Act of God," contractors are forced to devise claims avoiding the strictures of the Differing Site Conditions clause.

Although weather conditions (since they are considered an "Act of God") are not, in and of themselves differing site conditions for which price adjustments are allowable, such conditions may affect physical factors at the site so as to create compensable differing site conditions if the site factors were not shown in the contract documents and unknown to the contractor.¹³⁴ In William F. Wilke, Inc., the ASBCA found that unusually severe weather (consisting of rain, snow and freezing temperatures) resulted in excessive standing water and drainage; while the Government argued that the contractor's site visit should have confirmed the amount of work necessary to drain the site, the contractor successfully relied on erroneous elevations in the contract drawings coupled with the excessive wetness to prove his claim.¹³⁵

a key characteristic of an act of God is that its adverse consequences probably would have occurred regardless of any negligence on anyone's part."

¹³⁴ Titan Pacific Construction Corporation, ASBCA Nos. 24148 et al., 87-1 BCA ¶ 19,626.

¹³⁵ William F. Wilke, Inc., ASBCA No. 33223, 88-3 BCA ¶ 21,134.

Therefore the only limited exception available to obtain relief, is that severe weather must interact with a misrepresented subsurface site condition or an unknown or unusual physical condition at the site.¹³⁶

This is precisely what happened in the Tutor-Saliba-Parini case.¹³⁷ The PSBCA found that an underground obstruction encountered by a subcontractor during drilling operations constituted a differing site condition which delayed the erection of structural steel. While the Government acknowledged compensability under the contract terms and attempted site preparation, performance was delayed into San Francisco's rainy season. This in turn further delayed the originally scheduled performance date of 23 October 1980 until 10 December 1980. The Board granted an equitable adjustment but stated that the impact from the rain was limited to the difference between the originally contemplated erection period and that which actually

¹³⁶ Welch Construction Co., PSBCA No. 217, 77-1 BCA ¶ 12,322.

¹³⁷ Tutor-Saliba-Parini, PSBCA No. 1201, 87-2 BCA ¶ 19,775.

transpired."¹³⁸

Courts and boards of contract appeals have demonstrated a strong reluctance to cite the weather conditions as a basis for a successful differing site conditions claim.

B. PERMITS AND RESPONSIBILITIES CLAUSE

FAR 52.236-7, is required in solicitations and contracts when a fixed price construction contract is contemplated. As prescribed in FAR 36.507, it reads as follows:

PERMITS AND RESPONSIBILITIES (APR 1984)

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.¹³⁹

¹³⁸ *Id.*

¹³⁹ FAR 52.236-7 (APRIL 1984).

This clause places responsibility on the contractor to protect the materials and work performed. In Beach Building Corporation, the ASBCA held that there is a clear and well-established law that when a contract incorporated the standard FAR Permits and Responsibilities clause and other similar clauses, the contractor assumes strict liability for its work and materials until accepted by the Government.¹⁴⁰ In Titan Pacific Construction Corporation, the ASBCA relied on the same clause to determine that the repair of the work damaged by an Act of God was within the responsibility of the appellant.¹⁴¹

The ENG BCA in T.L. James held that a Government contractor generally assumes the risk of monetary damages and cost effects resulting from weather delays.¹⁴² The VABC in C.O.A.C. Inc. held that the appellant was not entitled to relief when he was impeded by heavy rainfall, water, and mud in the tunnels, resulting in the ground being too wet for

¹⁴⁰ Beach Building Corporation, ASBCA No. 30969, 88-1 BCA ¶ 20,490.

¹⁴¹ Supra note 133.

¹⁴² T.L. James, ENG BCA No. 5328, 89-2 BCA ¶ 21,643.

concrete trucks.¹⁴³ While holding that there was no evidence that the rainfall was unusually severe, the decision indicates that the reliance on the Differing Site Condition clause was misplaced. The IBCA in Peter Kiewit Sons' Company cites a series of board of contract appeals and court cases that stand for the proposition that rain does not constitute "physical conditions at the site" as contemplated by the Differing Site Conditions clause.¹⁴⁴

The ENG BCA in Orbit Construction Company held that no flood existed and the water levels did not vary materially from those anticipated in the specifications.¹⁴⁵ The same board, in Excavation-Construction Inc., held that since the Government was not responsible for the unusually severe weather, it was accordingly not responsible for any of the increased costs.¹⁴⁶ In addition, the Claims Court in Utility Contractors, held that the inundation by surface flooding

¹⁴³ C.O.A.C., Inc., VABC No. 2618, 88-3 BCA ¶ 21,159.

¹⁴⁴ Supra note 133. See also Coliseum Construction, VABC No. 2192, 86-2 BCA ¶ 18,857. "Weather is not a risk which is shifted to the Government via that clause."

¹⁴⁵ Orbit Construction Company, ENG BCA No. 3734, 86-2 BCA ¶ 18,748.

¹⁴⁶ Excavation-Construction Inc., ENG BCA No. 4225, 86-2 BCA ¶ 18,747.

following heavy rains is one of the hazards of the contractual undertaking; the court stressed that a contractor assumes certain risks when entering into a contract.¹⁴⁷

Other decisions have also relied on the Permits and Responsibilities clause to deny recovery where the contractor's only evidence of an alleged changed condition is an "Act of God". This occurred in Entech Sales and Service, Inc. where a contractor incurred additional costs in repairing electrical equipment damaged by lightning.¹⁴⁸ Although the contractor argued that the Government failed to take precautions to protect the building, the Board found no culpability on the Government's part since building codes did not require any lightning protection equipment. The contractor was also without fault but under the Permits and Responsibilities clause the contract clearly placed the risk of any damage to work, prior to acceptance and final payment, on the contractor.

Therefore the contractor should realize that under these types of facts the Permits and Responsibilities clause can be used by the Government to thwart a contractor's recovery.

¹⁴⁷ Utility Contractors, 8 Cl. Ct. 42 (1985), aff'd., 790 F.2d 90, cert. denied, 479 U.S. 827, 107 S. Ct. 104 (1986).

¹⁴⁸ Entech Sales and Services, Inc., PSBCA No. 2061, 88-1 BCA ¶ 20,447.

C. CONDITIONS ARISING AFTER BID

Although a literal reading of the Differing Site Conditions clause does not restrict recovery only to conditions that existed at the time the contract was formed, the ASBCA has interpreted such a restriction.¹⁴⁹

However, different interpretations of the applicability of the Differing Site Conditions clause have resulted in its seemingly questionable use. This particular aspect of the Differing Site Conditions clause does not produce the result desired by its drafters. When the Government was responsible for a man-made condition created by another contractor over whom the Government had control, the Court of Claims in Hoffman v. United States found a changed condition even though it occurred after contract award; this was rationalized as a breach of the Government's duty not to hinder performance.¹⁵⁰

In Frank W. Miller Construction Company, the ASBCA permitted

¹⁴⁹ Medsger, *supra* note 90 at 15, citing Randall H. Sharpe, ASBCA No. 22800, 79-1 BCA ¶ 13,869, see also Acme Missiles and Construction Co., ASBCA No. 10784, 66-1 BCA ¶ 5,418 (claim denied because hookworm infestation at the site was after contractual performance began).

¹⁵⁰ Hoffman v. United States, 166 Ct. Cl. 39, 340 F.2d 645 (1964).

a contractor to recover costs of removing sand fill washed down to its worksite from another contractor's site.¹⁵¹ In both of these cases, the Government had a duty to control and prevent such conditions caused by other contractors. The basis for sustaining the decisions should have been a breach of the Government's implied duty to cooperate as opposed to the Differing Site Conditions clause.¹⁵² Therefore, recovery under the Differing Site Conditions clause for post-award conditions has been limited to circumstances where the Government had a duty to correct the condition but failed to do so.¹⁵³

D. DIFFERING MATERIALLY

One of the similar requirements between Type I and Type II Differing Site Conditions clause which causes uncertainty involves attempts at quantifying how much is enough to meet the "conditions...which differ materially" requirement of both

¹⁵¹ Frank W. Miller Construction Co., ASBCA No. 22347, 78-1 BCA ¶ 13,039.

¹⁵² Medsger, *supra* note 102 at 15.

¹⁵³ Arkansas Rock & Gravel Co., ENG BCA No. 2895, 69-2 BCA ¶ 8,001; *Security National Bank of Kansas City v. United States*, 184 Ct. Cl. 741, 397 F.2d 984 (1968).

types of differing site conditions. A Government trial lawyer who extensively researched this area concluded that the vast majority of decisions discuss the actual conditions encountered and the conditions which should have been expected, and summarily conclude that there is, or is not, a material difference.¹⁵⁴ The "materiality" concept is not easily gleaned from the relevant case law.

To evaluate materiality, consideration must be given to:

1. the nature of the condition,
2. whether a precise quantity (without qualification) has been stated in the contract, and
3. whether an approximate quantity has been stated.¹⁵⁵

However, courts and boards of contract appeals have looked to other factors to assist them in making the materiality determination:

1. required measures exceeding the methods indicated as necessary in the specifications,¹⁵⁶

¹⁵⁴ McClure, *supra* note 16 at 167.

¹⁵⁵ *Id.*

¹⁵⁶ Bick-Com Corp., VACAB 1320, 80-1 BCA ¶ 14,285; Wall Street Roofing, VACAB 1373, 81-2 BCA ¶ 15,417, 83-2 BCA ¶ 16,568 .

2. the resulting quantitative difference in terms of the percentage actually encountered,¹⁵⁷ and

3. customs of the trade.¹⁵⁸

The clause language requires that the physical conditions differ materially, as opposed to the methods, materials or any other aspect. However, both costs and changes of performance methods, along with performance time, can be considered in determining the proper amount of the equitable adjustment to be awarded to the contractor.¹⁵⁹ This allows for a distinct possibility that courts and boards of contract appeals will improperly use these criteria to determine the contractor's entitlement (as opposed to quantum) to relief. The difference in costs, performance time and methodology will all be advanced by the contractor in an effort to prove how the actual physical conditions differ materially.

In conclusion, the Differing Site Conditions clause provides little guidance as to what is necessary to successfully shift the risk. Each substantive portion of the clause (e.g., differing materially, physical condition)

¹⁵⁷ Supra note 61, Kaiser, at 323.

¹⁵⁸ Gregg, Gibson and Gregg, Inc., ENG BCA No. 3041, 71-1 BCA ¶ 8,677.

¹⁵⁹ McClure, supra note 16 at 169.

constitutes a separate stumbling block for the claimant, requiring difficult determinations by the courts and boards of contract appeals.

CHAPTER 5

SITE INVESTIGATIONS

In the "Site Investigation and Conditions Affecting the Work" clause (April 1984) as detailed in FAR 52.236-3, the contractor is required to acknowledge that a site investigation has been accomplished to ascertain the quality and quantity, as well as the contractor's satisfaction with the site conditions. However, the use of this clause does not in and of itself require the presence of a Differing Site Conditions clause. While separate problems might result from the interpretation of the Site Investigation clause, its use does not mitigate the unpredictability of the success of a claim citing the Differing Site Conditions clause. The following clause is required by FAR 36.503 in the same contracts that contain the Differing Site Conditions clause.

SITE INVESTIGATION AND CONDITIONS

AFFECTING THE WORK (APR 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the

work or its cost, including but not limited to:

(1) conditions bearing upon transportation, disposal, handling, and storage of materials;

(2) the availability of labor, water, electric power, and roads;

(3) uncertainties of weather, river stages, tides, or similar physical conditions at the site;

(4) the conformation and conditions of the ground; and

(5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

This clause places the specific responsibility on the contractor for reasonably determining the surface and subsurface conditions at the work site. This proves to be consistent with the policy of the Differing Site Conditions

clause.¹⁶⁰ The Contractor must accomplish a "reasonable" site investigation. There have been many differences of opinion regarding what constitutes a reasonable site investigation. Most of the litigation concerning the duty to investigate site conditions focuses on the required thoroughness of the investigation.¹⁶¹ The contractors have the responsibility for all conditions that could be observed during a reasonable inspection. A reasonable site inspection is properly evaluated against what a rational, experienced, prudent, and intelligent contractor in the same field of work would discover.¹⁶² The knowledge that the reasonable contractor can gain from a thorough examination of the site is the standard which the law applies.¹⁶³ Most courts and boards of contract appeals share similar standards for site investigations. The ASBCA, for instance, has evaluated the standards in terms of what a reasonably experienced, intelligent contractor should

¹⁶⁰ Medsger, *supra* note 90.

¹⁶¹ Ellison, *supra* note 11.

¹⁶² W. G. Thompson, Inc., HUD BCA No. 79-353-C11, 81-2 BCA ¶ 15,411.

¹⁶³ McClure, *supra* note 16 at 151.

have discovered or anticipated.¹⁶⁴ Therefore, the contractor's ability to support his assertions requires a careful and complete site investigation.

However, while the site investigation standard appears to provide predictable and consistent relief, many factors relate to what information was and should have been discoverable by a site investigation. Since the contractor is obligated to perform only a reasonable investigation, knowledge of only that information discoverable by such an investigation may be imputed to him.¹⁶⁵ While contractors are held to the knowledge they would have become aware of through a reasonable site investigation, there is no requirement to conduct an extensive continuing analysis.¹⁶⁶

The requirement to conduct a site investigation must be balanced with the Government's positive representations concerning the physical conditions at the work site. If the Government makes positive representations in the contract

¹⁶⁴ Medsger, *supra* note 90 at 12 (only those conditions that were ascertainable by a reasonable site investigation are waived by the contractor's site investigation acknowledgement).

¹⁶⁵ Woodcrest, *supra* note 22.

¹⁶⁶ William Maloney, AGBCA No. 81-105-1, 82-1 BCA ¶ 15,529.

documents, the contractor is entitled to rely on these representations, and the contractor's claim will fail only if the condition would have been readily apparent by a simple site inspection. The contractor does not have to conduct his own site investigation to confirm the Government's statements.¹⁶⁷ Therefore, the information that the site investigation would reveal must be compared to the conditions indicated in the contract.¹⁶⁸ The stronger the contractual representation appears, the stronger the contractor's case that he relied on these positive representations. Where the standard contractual language is utilized, it would appear that a less extensive investigation is required than in those situations where the provision advises the contractor that he should direct his investigation toward information bearing upon a certain matter.¹⁶⁹

In the Type I situation, the contractor must balance the information from the site investigation with government representations and disclaimers, as well as any cautionary language. A contractor is held to a relatively simple site

¹⁶⁷ Perini Corp., ENG BCA No. 3745, 78-1 BCA ¶ 13,191; JB&C Inc., IBCA Nos. 1020-2-74 et al., 77-2 BCA ¶ 12,782.

¹⁶⁸ McClure, *supra* note 16 at 152.

¹⁶⁹ Morrison-Knudsen, *supra* note 66.

investigation standard and is responsible only for patent indications which contradict the representations contained in the contract documents.¹⁷⁰ Examples include instances where relief was denied because the contractor did not perform an adequate visual inspection and discover:

1. a ceiling that would not support insulation installation,¹⁷¹
2. nonstandard tub faucet heights,¹⁷²
3. an unexpected marsh,¹⁷³
4. rock outcroppings,¹⁷⁴ or
5. greenhouses in continuous use.¹⁷⁵

¹⁷⁰ Stock and Grove Inc. v. United States, 204 Ct. Cl. 103, 493 F.2d 629 (1974); Warren Beaves, DOTCAB No. 1150, 84-1 BCA ¶ 17,198.

¹⁷¹ Sealite Corp., ASBCA No. 26209, 83-2 BCA ¶ 16,792.

¹⁷² Lunseth Plumbing and Heating, ASBCA No. 25332, 81-1 BCA ¶ 15,063.

¹⁷³ Hoyt Harris Inc., ASBCA No. 23543, 81-1 BCA ¶ 14,829.

¹⁷⁴ Schnip Building Co., ASBCA No. 21637, 78-2 BCA ¶ 13,310, aff'd. sub nom., Schnip Building Co. v. United States, 227 Ct. Cl. 148, 645 F.2d 950 (1981).

¹⁷⁵ Alert Plumbing Co., GSBCA No. 6487, 84-1 BCA ¶ 17,229.

These cases can be contrasted with a long series of cases that did not require additional care or effort during the site inspections beyond what could be observed by an alert contractor who was familiar with the contract requirements. In the following cases, the reasonableness of the contractor's site investigation was unsuccessfully challenged by the Government. Contractors are not required to:

1. poke or dig holes in ceilings,¹⁷⁶
2. remove and analyze shingles,¹⁷⁷
3. discover latent depressions in a structural support system,¹⁷⁸
4. dismantle part of the roof,¹⁷⁹
5. determine if a trail was located on Government

¹⁷⁶ Winandy Greenhouse Co. Inc., ASBCA No. 93928, 89-1 BCA ¶ 21,495.

¹⁷⁷ Fermino O. Gonzalez, ASBCA No. 21421, 80-1 BCA ¶ 14,254.

¹⁷⁸ Leonard Blinderman Construction Co. Inc., ASBCA No. 18946, 75-1 BCA ¶ 11,018.

¹⁷⁹ Southern Roofing & Petroleum Co., ASBCA No. 12841, 69-1 BCA ¶ 7,599; Southern Cal Roofing Co., PSBCA No. 1737, 88-2 BCA ¶ 20,803 (Government's argument that contractor was required to make roof cuts during the site investigation in order to determine thickness and condition was found to be unreasonable).

property when drawings marked it as such,¹⁸⁰

6. notice that a duct was lower than shown on drawings,¹⁸¹

7. determine the hardness of mortar by visual inspection,¹⁸²

8. inspect the interior of the pipe of an operating system on a relatively minor work item,¹⁸³ or

9. wade through heavy vegetation or foliage to uncover rock outcroppings.¹⁸⁴

However, taking notice of the specific condition or realizing that inconsistencies exist may require the contractor to make additional inquiries. Courts and boards of contract appeals have determined that the contractor should have:

¹⁸⁰ *McKee v. United States*, 205 Ct. Cl. 303, 500 F.2d 525 (1974).

¹⁸¹ *Central Mechanical, Inc.*, DOTCAB No. 1234, 83-2 BCA ¶ 16,642.

¹⁸² *George E. Jensen Contractors, Inc.*, ASBCA No. 20234, 76-1 BCA ¶ 11,741.

¹⁸³ *Price/CIRI Construction*, ASBCA Nos. 36988, 37000, 89-3 BCA ¶ 22,146.

¹⁸⁴ *Robert D. Carpenter, Inc.*, ASBCA No. 22297, 79-1 BCA ¶ 13,675.

1. realized that power lines were underground and should have attempted to locate them,¹⁸⁵

2. anticipated that the roof was a coal tar pitch roof,¹⁸⁶

3. discovered unsuitable decayed vegetation from a soil boring indication,¹⁸⁷

4. known that mortar at West Point was especially hard,¹⁸⁸ or

5. inquired when the Government was installing the transformers, work which the solicitation called for.¹⁸⁹

Therefore, in the absence of a clear statement by the Government of conditions to be expected at the site, a contractor will have to exercise caution with respect to the information supplied. Boards of contract appeals will focus

¹⁸⁵ Hensel Phelps Construction Co., ASBCA No. 27138, 83-1 BCA ¶ 16,367.

¹⁸⁶ TGC Contracting Corp. v. United States, 736 F.2d 1512 (Fed. Cir. 1984).

¹⁸⁷ Parkland Design & Development Corp., IBCA No. 1442-3-81, 82-2 BCA ¶ 15,975.

¹⁸⁸ Eris Painting and General Corporation, ASBCA No. 27803, 84-1 BCA ¶ 17,148. See also Brooks & Rivellini, Inc., ASBCA No. 25874, 84-1 BCA ¶ 17,102. (Contractor only took mortar samples from two of the four buildings.)

¹⁸⁹ Rockford Corporation, ASBCA No. 37198, 89-2 BCA ¶ 21,734.

on whether the work necessary to overcome the condition should be considered inherent in performing the contract, rather than on the thoroughness of the site investigation; the evidence presented is the decisive factor.¹⁹⁰ Information is examined in the context of the contract documents, and if it is found not to be a representation of the overall conditions to be expected at the site, the contractor may have no foundation for claiming a Type I differing site condition.

In a typical Type II differing site condition situation, the Government will provide neither indications nor positive representations concerning the site. If the contract documents are silent concerning conditions at the work site, the contractor may have an obligation to ask if the Government has any relevant information concerning the site in its possession, such as logs or borings.¹⁹¹ A reasonable site investigation might require test borings when no borings or reports were provided by the Government.¹⁹² This might be

¹⁹⁰ Medsger, *supra* note 90 at 14, "This may be based on the practical consideration that the Government does not want every prospective bidder climbing on the roof and tearing it apart during the site investigation."

¹⁹¹ J. W. Bateson Construction Company, Inc., ASBCA No. 9474, 65-1 ¶ 4,661.

¹⁹² McMullan & Sons, Inc. v. United States, 226 Ct. Cl. 565 (1980).

offset when the Government knows of a condition but fails to reveal it.¹⁹³

The contractor should discover the conditions which are reasonably open and accessible. In Minter Roofing Company, the ASBCA held that a contractor installing new siding on existing buildings was entitled to additional compensation because the buildings were seriously out of plumb.¹⁹⁴ While the contractor asserted the Government's non-disclosure of superior knowledge, the Government unsuccessfully attacked the reasonableness of the site investigation.¹⁹⁵ Therefore, the Government must disclose information regarding site conditions in order to rely on an assertion of a problematic site investigation.¹⁹⁶ These cases create confusion regarding the importance of a reasonable site inspection. This confusion is further compounded by Government assertions that it is normal practice not to include the entire site investigation

¹⁹³ Commercial Mechanical Contractors Inc., ASBCA No. 25695, 83-2 BCA ¶ 16,768.

¹⁹⁴ Minter Roofing Company, ASBCA Nos. 29387, 29897, 90-1 BCA ¶ 22,279.

¹⁹⁵ *Id.*

¹⁹⁶ Joseph A. Cairone, Inc., ASBCA No. 20504, 81-2 BCA ¶ 15,220.

report in the solicitation.¹⁹⁷

When the contractor does not conduct a site investigation and where nothing would be revealed even if he did, the contractor can still be compensated for encountering differing site conditions.¹⁹⁸ However, most site investigations reveal some relevant conditions. The contractor bears the burden of proving that a reasonable investigation would not have revealed the differing site condition.¹⁹⁹ Therefore, a contractor who performs even an inadequate investigation bears the risk of any differing site condition which could have been discovered by a reasonable site investigation.²⁰⁰

The mere failure to perform a site investigation is not dispositive. In fact, the Comptroller General has ruled that a bidder's failure to perform a prebid site inspection -- even where required by the solicitation -- does not limit the obligation undertaken by the bidder, and such a failure does

¹⁹⁷ J.N. Futia Co., ASBCA No. 33658, 89-2 BCA ¶ 21,802.

¹⁹⁸ McClure, *supra* note 16 at 153 citing *Vann v. United States*, 190 Ct. Cl. 546, 420 F.2d 968 (1970).

¹⁹⁹ Medsger, *supra* note 90 at 14 citing *Tutor-Saliba*, ASBCA No. 23766, 79-2 BCA ¶ 14,137.

²⁰⁰ Mojave Enterprises, AGBCA No. 75-114, 77-1 BCA ¶ 12,337.

not provide a basis for rejection of the bid.²⁰¹ The court or board of contract appeals must determine whether the condition would have been discovered had a reasonable site investigation been conducted. However, there can be countervailing considerations that do not add any measure of certainty to the rule that the contractor forgoes the site investigation at his peril. In Tri-Ad Constructors v. United States, the CAFC was faced with a situation where the contractor claimed that the amount of cable it had to install represented a differing site condition.²⁰² In the previous decision the ASBCA held for the Government, citing that the contractor failed to make a site inspection.²⁰³ Subsequently, the CAFC, in an unpublished decision, reversed the ASBCA on appeal, and held that the contractor reasonably relied on the contract drawing's

²⁰¹ Edward Kocharian and Company, Inc., B-193045, 79-1 CPD ¶ 20; Construcciones Jose Carro, Inc., B-236117, 89-2 CPD ¶ 430.

²⁰² Tri-Ad Constructors v. United States, 883 F.2d 1027 (C.A. Fed. 1989). "All of the government's estimates support Tri-Ad's contention that the contract drawings indicate that only 31,000 linear feet of cable would be needed. The job actually required 38,076 linear feet. This difference of 7,076 linear feet constitutes a 22 1/2% increase over that arrived at by scaling the drawings. The government submitted no evidence disputing these facts."

²⁰³ Tri-Ad Constructors, ASBCA No. 34732, 89-1 BCA ¶ 21,250.

indications of the subsurface conditions, and ruled that the contractor was entitled to recover.²⁰⁴

The reason for the contractor's failure to investigate is an important consideration. If the contractor's failure to investigate is attributable to Government action or inaction, then the requirement to investigate is excused. When a contractor is prevented by the Government from conducting a reasonable site investigation, the requirement to investigate will not be enforced. This has occurred when:

1. a contractor twice attempted to investigate, but was denied access;²⁰⁵
2. two months proved insufficient time to survey more than 300 kilometers of road in Thailand;²⁰⁶ and
3. the Government did not allow sufficient time (only forty-three days between invitations for bid and bid opening) for the contractor to adequately investigate subsurface

²⁰⁴ Supra note 202.

²⁰⁵ Pavement Specialists, Inc., ASBCA No. 17410, 73-2 BCA ¶ 10,082.

²⁰⁶ Raymond International of Delaware, Inc., ASBCA No. 13121, 70-1 BCA ¶ 8,341.

conditions.²⁰⁷

These cases should be distinguished from instances where contractors merely experience difficulty in investigating;²⁰⁸ where the inspection was hurried due to the illness of one of the contractor's officers,²⁰⁹ or where a third party prevents the contractor from inspecting the site.²¹⁰ Mere difficulty in conducting or completing an investigation will not afford a contractor relief from the requirement to conduct a reasonable site investigation. In addition, the ASBCA in Quality Services of N.C., Inc., held that the contractor's failure to inspect because he was "... deathly afraid of snakes..." resulted in a denial of his claim that the existence of subsurface water was a condition different from the known or usual that could not have been discovered before bidding.²¹¹

²⁰⁷ *J. D. Hedin Construction Co. v. United States*, 171 Ct. Cl. 70, 347 F.2d 235 (1965).

²⁰⁸ *R. M. Duval Construction Co.*, ASBCA No. 8629, 1963 BCA ¶ 3,722, aff'd., 1963 BCA ¶ 3,790.

²⁰⁹ *M&M Enterprises, Inc.*, ENG BCA No. 5306, 89-2 BCA ¶ 21,641.

²¹⁰ *Cal-Pacific Foresters*, AGBCA No. 230, 70-1 BCA ¶ 8,087 (1970).

²¹¹ *Quality Services of N.C. Inc.*, ASBCA No. 34851, 89-2 BCA ¶ 21,836.

Often the Government asserts that the overriding factor should be that the contractor did not perform an adequate site inspection.²¹² In addition, the Government also typically alleges that a reasonable site investigation should give rise to a duty to inquire involving the condition in question.

Courts and boards of contract appeals have held that the bidders must fulfill their requirement to inquire based on some indication or lack thereof. In Giuliani Contracting Co., the ASBCA held that there was an obvious omission of vital site information, specifically the location of asphalt underlaid with concrete, that gave rise to a duty to inquire.²¹³ The contractor made a thorough pre-bid site inspection, and found visual signs of concrete in one area and not the other, and based his bid accordingly; nevertheless, the claim was denied.²¹⁴

Inquiries and requests for clarification must be made

²¹² *North Slope Technical Ltd. v. United States*, 14 Cl. Ct. 242, (Cl. Ct. 1988). "The duty to make a pre-bid inspection of the site does not negate the differing site conditions clause by putting the contractor at peril to discover hidden subsurface conditions or these beyond the data on subsurface conditions..."

²¹³ *Giuliani Contracting Co.*, ASBCA No. 33341, 87-2 BCA ¶ 19,743.

²¹⁴ *Id.*

regardless of whether the Government has asserted that any oral explanations or instructions are not binding on the Government. In Rockford Corp., The ASBCA denied a claim because the contractor did not follow the required procedure for clarification.²¹⁵ This denial is troubling because the contractor made a good faith deduction in his bid based on the site investigation.

Therefore, it is incumbent on a Government contractor to make a thorough site inspection, as well as the necessary and appropriate requests for clarification. Without these two important prerequisites, a claim under the Differing Site Conditions clause would be even more difficult to pursue.

²¹⁵ Supra note 189.

CHAPTER 6

VARIATION IN ESTIMATED QUANTITY

A. OVERVIEW

The Variation in Estimated Quantity (VEQ) clause provides an independent basis for relief in that there is no requirement to assert the Differing Site Conditions clause when filing a claim under the VEQ clause. In the continuing Government effort to minimize contingencies, the VEQ clause is available for the contractor to receive an equitable adjustment when the actual quantities of materials vary from the range indicated in the contractual estimations. The clause attempts to use a benchmark specified in terms of a percentage of the estimated quantity. The VEQ clause establishes a standard differential to use based on the unit prices.²¹⁶ Since there is interplay between the Differing Site

²¹⁶ Bean Dredging Corporation, ENG BCA No. 5507, 89-3 BCA ¶ 22,034. "The theory behind the VEQ clauses is that both parties expect to be bound to the contract unit price within a prescribed reasonable range of the estimated quantities but that large variations may require some adjustments to the unit prices or the total contract price to prevent either windfalls or losses, potentially even immense windfalls or ruinous losses, to the contractor. The object is to retain a fair price for the contract as a whole in the face of unexpectedly large variations from the estimated quantities on which bids

Conditions and Variations in Estimated Quantity clauses, the relationship between the two must be scrutinized.

FAR 12.403(c) mandates the use of the following clause (FAR 52.212-11) when a fixed-price construction contract is contemplated that includes a potential variation in the estimated quantity of unit-priced items:

VARIATION IN ESTIMATED QUANTITY

(APR 1984)

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as in the judgement of the Contracting Officer, is justified.²¹⁷

were based. The standard VEQ clause calls for use of the contract unit prices for quantities within 15 percent of the estimated quantities." (Judge Sheridan, concurring opinion)

²¹⁷ FAR 52.212-11.

The predecessor clause, DAR 7-603.27, had only minor differences; it provided identical provisions for quantitative variations and unit price adjustments.²¹⁸

B. INTERFACE WITH DIFFERING SITE CONDITIONS CLAUSE

The Differing Site Conditions clause takes precedence over the Variation in Estimated Quantity clauses whenever the differing site conditions claim is established. The Differing Site Conditions clause controls, and the contractor is granted an equitable adjustment for the materially differing conditions when the other provisions of the clause are satisfied.²¹⁹ Where a contractor encounters an "entirely different job",²²⁰ or an unforeseen need for unusual methodology,²²¹ an equitable adjustment will be granted even if the resulting quantities vary by less than fifteen percent.

²¹⁸ DAR 7-603.27.

²¹⁹ McClure, *supra* note 16 at 174.

²²⁰ Brezina Construction Inc., ENG BCA No. 3215, 75-1 BCA ¶ 10,989.

²²¹ Dunbar & Sullivan Dredging Co., ENG BCA No. 8265, 73-2 BCA ¶ 12,285.

While the two FAR clauses are designed to work harmoniously there are situations where the Variation in Estimated Quantities clause is not applicable. The Variation in Estimated Quantities clause will not apply if the Government estimate is negligently made.²²² In addition, this clause does not apply when Government change orders substantially increase the estimated quantities.²²³

Even though price provisions are provided in the contract, material variations from Government-furnished estimates for the quantity of work may be treated as a Type I differing site condition if a material difference was the result of a changed condition.²²⁴ The Department of Housing and Urban Development Board of Contract Appeals (HUDBCA), in Dayton Construction Company, held that a review of all contract documents is required to determine whether the variation from the approximate quantities will constitute a

²²² John Murphy Construction Co., AGBCA No. 418, 79-1 BCA ¶ 13,836.

²²³ Leavell & Co., ENG BCA No. 3492, 75-2 BCA ¶ 11,596.

²²⁴ United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585 (1966).

Type I differing site condition.²²⁵ Some boards of contract appeals have held that the cause of the work growth is the important determination. However in Weeks Dredging and Contracting v. United States, the Claims Court held that differences in anticipated quantities rather than differences in character and nature do not constitute a typical differing site conditions claim.²²⁶ In Spirit Leveling Contractors v. United States the Claims Court held that a claim based on excess quantity with respect to a Type I Differing Site Conditions clause fails from the outset.²²⁷

A substantial variation from the Government estimate of quantity, by itself, is not a differing site condition.²²⁸ Even a substantial variation from a contract estimate does not constitute a materially different site condition if the

²²⁵ Dayton Construction Co., HUDBCA No. 82-746-034, 83-2 BCA ¶ 16,809.

²²⁶ *Supra* note 77.

²²⁷ *Spirit Leveling Contractors v. United States*, 19 Cl. Ct. 84, (Cl. Ct. 1989).

²²⁸ *King Fisher Marine Services, Inc., ENGBCA Nos. 3161 et al., 71-2 BCA ¶ 9,073.*

variation was reasonably foreseeable.²²⁹ The Court of Claims in Perini Corporation v. United States summarized the applicable rule for granting an equitable adjustment to unit prices contained in contracts when the Government was attempting to correct its own mistake in estimating the quantity. The court held that the Government is no more entitled to use its faulty estimate to invoke the benefits of the clause than is a careless contractor who makes an improvident bid based on a duty to perform a pre-bid site inspection.²³⁰ Therefore, the Government must be reasonable in its preparation of the specific amount of the original quantity.

C. CONCLUSION

The Variations in Estimated Quantity clause provides certainty when a quantity variation causes a change in the contractor's cost.²³¹ Since the Variation in Estimated

²²⁹ E.J.T. Construction Co., ASBCA No. 17425, 73-2 BCA ¶ 10,050.

²³⁰ Perini Corp. v. United States, 180 Ct. Cl. 768, 381 F.2d 403, 415 (1967).

²³¹ Victory Construction Company, Inc. et al. v. United States, 206 Ct. Cl. 274, 510 F.2d 1379 (1975) "It is difficult to imagine definitive language that would more clearly convey

Quantity clause provides for the reasonably-foreseeable overrun, the preemptive effect of the Differing Site Conditions clause decreases the predictability and certainty of the Variation in Estimated Quantity clause.

an absolute limitation on the metes and bounds of inquiry in the determination of a departure from contract unit prices in the pricing of work outside the parameters of permissible variance. The language is fully as explicit in specifying the basis for any recasting of prices as it is in mathematically defining the volumetric prerequisite to any adjustment at all. Distinctly, the proponent of an adjustment is told that it will be confined in amount to such cost differentials as are directly attributable to a volume deviation greater than 15 percent from stated contract quantities."

CHAPTER 7

NOTICE

While the Differing Site Conditions clause clearly requires prompt written notice of a potential differing site condition, this requirement seems to be selectively enforced. Whenever a portion of a clause is not strictly adhered to, it undermines the use of the entire clause. The notice requirement in the Differing Site Conditions clause mirrors the predecessor Changed Conditions clause and requires the contractor who has encountered such a condition to promptly notify the contracting officer in writing before disturbing the condition.

Prompt notice allows for expeditious Government investigation and evaluation, as well as a determination as to the presence of differing site conditions. This requirement permits the Government to view the conditions, evaluate the difference, and resolve the situation by changing plans.²³² It also allows a contracting officer to make an

²³² McClure, *supra* note 16 at 175, citing Barnet Brezner, ASBCA No. 9967, 65-2 BCA ¶ 4,902; Carson Linebaugh, Inc., ASBCA No. 11384, 67-2 BCA ¶ 6,640.

informed decision about what course of action to follow. If the Government has an opportunity to investigate and verify the existence of the changed condition, it will be able to determine if an alteration of the work is possible to avoid an excessive cost increase.²³³

The lack of timely notice may prejudice the Government's ability to determine the extent of the problem. Late notification (even if it prejudices the Government by making the investigation and defense of the claim more difficult) will not bar a contractor's claim, but it will increase the contractor's burden of persuasion in proving the claim.²³⁴ Boards of contract appeals and courts have seemingly penalized contractors for late notice. In Sol Flores Construction, Inc., the ASBCA sustained a differing site conditions claim and allowed for payments of "stand-by costs" to commence on the day of the notification, as opposed to the day in which work actually stopped.²³⁵ In Schnip Building Company v. United States, the Court of Claims held that prejudice may be shown

²³³ Mingus Constructors, Inc., INTBCA No. 2117, 88-2 BCA ¶ 20,529.

²³⁴ Leavell, *supra* note 223.

²³⁵ Sol Flores Construction - A Division of Floresol and Company, Inc., ASBCA No. 32726, 89-3 BCA ¶ 22,154.

by how the passage of time obscured the elements of proof or how the defendant could have minimized the extra work and attendant costs.²³⁶

The type and format of the notice are not always important. While there is a regulatory requirement for the notice to be written,²³⁷ oral notice is normally sufficient.²³⁸ Written notice might be impractical due to various circumstances.²³⁹ However, when notice is oral, the contractor bears the burden of proving that there was actual verbal notice.²⁴⁰ If the Government does not investigate because the contractor provided oral notice, it becomes more difficult to demonstrate that the Government was furthering the purpose of the clause: to utilize the opportunity to resolve new situations with alternative approaches. Therefore the Government would have a difficult time arguing that it was

²³⁶ Supra note 174.

²³⁷ FAR 52.236-2(a).

²³⁸ M. M. Sundt Construction Co., ASBCA No. 17475 , 74-1 BCA ¶ 10,627.

²³⁹ Skipper and Company, ASBCA No. 30327, 89-1 BCA ¶ 21,490.

²⁴⁰ Supra note 174.

prejudiced by a lack of written notice.

Notice formalities are waived when the Government's representative is made aware of the alleged differing site condition. The Government is deemed to have constructive notice of the conditions encountered when an authorized representative of the contracting officer had first-hand knowledge of the contractor's use of a different method.²⁴¹ However, more than the mere observation by the Government's representative is necessary; the inspector must be made aware of the reason for the change in the construction method or that there was a material difference from the condition described in the contract documents.²⁴²

Once the Government has the opportunity to accurately document the amount of extra work encountered by the contractor resulting from the changed condition, the Government cannot ignore this opportunity and later claim it was prejudiced if the contractor continued performance in a reasonable manner.²⁴³ Therefore, failure to give prompt

²⁴¹ S. Kane & Sons Inc., VACAB No. 1254, 78-1 BCA ¶ 13,100.

²⁴² Samkal Mines Inc., DOTCAB No. 68-9, 71-1 BCA ¶ 8,737.

²⁴³ Singleton Contracting Corp., IBCA No. 1413-12-80, 81-2 BCA ¶ 15,269.

written notice is not fatal to the contractor when the contracting officer has received timely actual or constructive notice.²⁴⁴ However, in Marleen Deen, the IBCA held that the mere mention of hidden explosives to the Government inspector was a "prejudicially inadequate" notice.²⁴⁵

If the Government did not learn of the condition in time to investigate, the notice requirements may be waived if the Government is not prejudiced by the lack of notice.²⁴⁶ The Government has the burden of showing that prejudice resulted from the contractor's failure to give proper notice.²⁴⁷ However, the Government may also attempt to entirely deny the contractor's claim based on an argument that if the contractor had considered the actual condition to be a differing site condition, a notification would have been made.²⁴⁸ This

²⁴⁴ McClure, *supra* note 16 at 175, citing Jack Crawford Construction Corp., GSBCA Nos. 4089 et al., 75-2 BCA ¶ 11,387 (contracting officer was aware of the condition from his own observations) .

²⁴⁵ *Marlene Deen dba M.D. Activities*, IBCA No. 2113, 88-1 BCA ¶ 20,328, aff'd., 88-2 BCA ¶ 20,593.

²⁴⁶ *R. C. Hedreen Co.*, GSBCA No. 4289, 77-1 BCA ¶ 12,521; *Lyburn Construction Co.*, ASBCA No. 9576, 65-1 BCA ¶ 4,645.

²⁴⁷ *Parcoa, Inc.*, AGBCA No. 76-130, 77-2 BCA ¶ 12,658.

²⁴⁸ See *Occupacia Corporation*, ENG BCA No. 5382, 88-2 BCA ¶ 20,820. "The contemporaneous actions of parties evidencing interpretation of a contract prior to a dispute are to be

situation may simply result in an increase in the amount of proof that the contractor must produce in order to recover.²⁴⁹ Therefore, the lack of notice may or may not jeopardize the contractor's claim.

Both the contractor and the Government have the duty to act promptly and reasonably. As for the contractor's duty to make a prompt notification, the Claims Court in Dawco Construction, Inc. v. United States, recognized the practical problems with the "prompt" requirement:

It would appear to the court that a differing subsurface site condition cannot be identified as such immediately. It does not spring forth with full force with a label "differing site condition". Rather, some time must be spent working in the area before it can be reasonably realized that the site truly differs from the description in the contract documents.... It is not until the contractor has had more time to work in an area that it would become apparent that the site condition differed from what the contractor was told to expect. This inherent time for discovery of a differing site condition affects the definition of "prompt" notice. It is only after that discovery time that "promptness" can reasonably be measured.²⁵⁰

given great if not controlling weight."

²⁴⁹ Peterson Sharpe Engineering Corp., ASBCA No. 18780, 77-1 BCA ¶ 12,299.

²⁵⁰ Supra note 42.

If the Government is late in its responsibility to investigate and give direction, it becomes responsible for the contractor's increased costs. This can be distinguished from a pure delay claim based on a theory of constructive suspension of work. If the Government fails to take such action, it may be prevented from later questioning the contractor's methods employed in handling the condition.²⁵¹ In addition, the contractor must proceed diligently with performance of the unchanged work pending resolution of the issue. The contractor's failure to proceed may properly result in a termination for default.²⁵² However, a contractor's inability to proceed due to commercial impracticability because of a differing site condition would result in a finding that a termination for default is improper.²⁵³ If a termination for default is converted to a termination for convenience, the Government is responsible for additional

²⁵¹ Industrial Foundations FAACAP No. 67-8, 66-2 BCA ¶ 5,806.

²⁵² Discount Co. v. United States, 213 Ct Cl. 567, 554 F.2d 435, cert. denied, 434 U.S. 938, 98 S. Ct. 428, (1977); American Dredging Co., ENGBCA No. 2920, 72-1 BCA ¶ 9,316, aff'd. 207 Ct. Cl. 1010 (1975).

²⁵³ Xplo Corporation, DOTCAB No. 1289, 86-3 BCA ¶ 19,125.

costs.

Recent cases have stressed that certain types of notice are insufficient. In J.S. Alberici Construction Co., the GSBCA disagreed with the contractor's suggestion that the notice requirement was fulfilled when the shop drawings were submitted for approval.²⁵⁴ The timeliness of the notice has also been emphasized. In AAAA Enterprises, Inc. v. United States, the CAFC affirmed the ASBCA's finding that the contractor failed to notify the Government in a timely fashion, which resulted in the denial of all relief.²⁵⁵

Other boards of contract appeals have also strictly interpreted the notice requirement of the Differing Site Conditions clause. In T.E. Bertagnolli and Associates, the AGBCA determined that no adjustment would be made to the contract price. This was because the contract not only required written notice but also specifically provided that, in the absence of such notice, no adjustment to the contract price on the basis of a differing site condition was

²⁵⁴ J.S. Alberici Construction Company, GSBCA No. 10019, 90-1 BCA ¶ 22,320.

²⁵⁵ AAAA Enterprises, Inc. v. United States, unpublished, Fed. Cir., (29 May 1987), 6 FPD ¶ 69.

allowed.²⁵⁶

As there are few cases holding that the proffered notice of the differing site condition was inadequate, boards of contract appeals are more likely to hold that a contractor has failed to prove the presence of a differing site condition. An example of this is Mingus Constructors, Inc., where the IBCA held that no differing site condition existed since the contractor first alleged that the width of the sealant was different for 600,000 feet of transverse joints upon completion of the removal.²⁵⁷ Therefore, the worst approach a contractor could take after encountering a differing site condition is to remain silent and begin his own resolution of the problems.

The notice requirement is very straightforward. However, the requirement for written notice is seldom enforced, with the result being several inconsistent decisions. The lack of uniformity of the notice requirement undermines the necessity of strict adherence to the Differing Site Conditions clause.

²⁵⁶ T.E. Bertagnolli and Associates, AGBCA No. 83-269-1, 89-3 BCA ¶ 21,947.

²⁵⁷ Supra note 233.

CHAPTER 8

GOVERNMENT DISCLAIMERS

Government disclaimers often attempt to change the risk allocation of the Differing Site Conditions clause. A review of these disclaimers indicates two possible options: either the disclaimer will be ignored or the disclaimer will override the clause. Disclaimers are commonly used in Government contracts with the intention of shifting the risk to the contractor for various representations made in the contract documents. The clause at FAR 52.236-4 demonstrates how the Government disclaimers attempt to be both general and specific:

PHYSICAL DATA (APR 1984)

Data and information furnished or referred to below is for the contractor's information. The Government shall not be responsible for any interpretation of or conclusion drawn from the data or information by the contractor.

(a) The indications of physical conditions on the drawings and in the specifications are the result of site investigations by [insert a description of investigational methods used, such as surveys, auger borings, test pits, probings, test tunnels].

(b) Weather conditions [insert a summary of weather records and warnings].

(c) Transportation facilities [insert a summary of transportation facilities providing access from the site, including information about their availability and limitations].

(d) [insert other pertinent information].²⁵⁸

Most Government contracts contain boilerplate clauses and special conditions which contain disclaimer and exculpatory language intended to relieve the Government of liability under certain stated circumstances. If literally applied, they could frustrate the intended purposes of the Differing Site Conditions clause.²⁵⁹

The use of such disclaimers of responsibility for subsurface soil data has been challenged, and often they have not been enforced.²⁶⁰ Courts and boards of contract appeals have generally declined to enforce disclaimers and exculpatory clauses designed to undercut the contractor's reliance on soil boring data in the contract documents.²⁶¹ Once again the contractor encounters a frustrating concern: trying to

²⁵⁸ FAR 52.236-4.

²⁵⁹ Currie, *supra* note 2 at 9.

²⁶⁰ Tansey, "Analyzing Contractor Claims," *Construction Briefings* 88-8, July 1988 at 3.

²⁶¹ Ruttinger, *supra* note 21 at 68.

determine which references are dispositive.

While broadly-written disclaimers have been ineffective, clear and unambiguous limitations may shift the risk for certain conditions to the contractor. Examples of the successful shifting of the risk to the contractor are neither uniform nor predictable. Some examples of risk shifting include:

1. specific warnings advising that the absence of a representation of permafrost in the area did not negate the possibility of encountering it;²⁶²
2. express warnings as to the type or quantity of materials to be encountered;²⁶³
3. a soil report expressly disclaimed as part of contract documents;²⁶⁴
4. a Government disclaimer of drawings which were neither developed by nor in possession of the federal

²⁶² William A. Smith Contracting Co. v. United States, 188 Ct. Cl. 1062, 412 F.2d 1325 (1969).

²⁶³ Puget Sound Bridge & Dredging Co. v. United States, 131 Ct. Cl. 490, 130 F. Supp. 368 (1955).

²⁶⁴ Dravo Corp., ENG BCA No. 3901, 80-2 BCA ¶ 14,757.

Government;²⁶⁵

5. express cautionary language in the Physical Data clause indicating that the data was furnished for the contractor's information only, resulting in a finding that contractor was not bound by its contents;²⁶⁶ and

6. an express statement indicating that a borrow pit might not contain sufficient material necessary to perform the entire contract, resulting in a finding that plaintiff assumed the risk of the necessity of extending the pit excavation.²⁶⁷

Even though the Differing Site Conditions clause is a mandatory clause to be used in Government construction contracts, a contractor must be sensitive to Government attempts to specifically warn the contractor to neither rely on nor draw conclusions from certain representations.

Enforcing specific Government disclaimers circumvents the purpose of the Differing Site Conditions clause. The presence of the specific disclaimer may result in the information not

²⁶⁵ P. J. Maffei Building Wrecking Corp. v. United States, 3 Cl. Ct. 482, aff'd, 732 F.2d 913 (Fed. Cir. 1984).

²⁶⁶ American Structures, ENG BCA No. 3410, 76-1 BCA ¶ 11,683.

²⁶⁷ Jefferson Construction Co. of Fla. v. United States, 176 Ct. Cl. 1363, 364 F.2d 420 (1966), cert. denied 386 U.S. 914, 87 S. Ct. 865 (1967).

being considered as a part of the contract.²⁶⁸ Therefore, contractors experience a dilemma: they cannot be sure whether the representations are a part of the contract. If they are, they must be clear enough to avoid the necessity of including a contingency factor in their bid to protect against conditions which vary from the representations indicated in the contract documents.

Enforcement of a disclaimer can result in the Government being estopped from asserting that the contractor should be imputed with the knowledge of the contents of that information.²⁶⁹ In some instances, courts and boards of contract appeals have allowed contractually-furnished information to be overridden by warnings that the information is not to be relied upon. This further undermines the intent of the Differing Site Conditions clause.

²⁶⁸ Construction Briefings, January 1990, at 12, "... courts will scrutinize carefully any attempt ... to limit that responsibility and will not allow general disclaimers to overcome specific affirmative misrepresentations of soil conditions in the plans and specifications. Conversely, courts will usually enforce detailed, specific disclaimers as to particular subsoil information provided to bidders."

²⁶⁹ McClure, *supra* note 16 at 149, "Quite possibly, a specific disclaimer can operate as a double-edged sword, especially if the disclaimed information is not indicated positively in the contract elsewhere."

CHAPTER 9

COMMON LAW RELIEF

The premise of this thesis is that the Government should use a cost reimbursement approach to the site preparation portion of the construction contract. If the contractor is without the Differing Site Conditions clause or a cost-reimbursement method, then he must resort to common law for relief.

The alternative avenues of relief presented are set forth in this chapter to generally outline what a contractor could allege in the absence of both the Differing Site Conditions clause and a provision for cost-reimbursement.

A. MUTUAL MISTAKE

Contractors may obtain relief where they encounter extreme difficulties in carrying out performance due to mutual mistake. The mutual mistake doctrine arises when both parties assume a fact which is nonexistent or substantially different than reality. When a court or board of contract appeals finds that the risk was not assumed by either party, it may declare

a mutual mistake and decide that additional costs are to be borne equally by the Government and the contractor.²⁷⁰

Several scenarios would warrant a mutual mistake determination when differing site conditions are encountered. Even though each party may have made reasonable attempts to investigate the existing conditions at the site or made reasonable assumptions that there was nothing unusual about the site that required investigation, a problem may still arise. In the historic National Presto Industries Inc. case, the Court of Claims granted reformation when both parties were under the same misapprehension and the contractor did not assume the whole risk either under the contract or by custom.²⁷¹ Notwithstanding the scarcity of cases citing either

²⁷⁰ Markell and Meagher, "Impossibility of Performance - Edition III" Briefing Papers No. 88-6, June 1988.

²⁷¹ National Presto Industries v. United States, 167 Ct. Cl. 749, 338 F.2d 99, (1964), cert. denied, 380 U.S. 962 (1965). "For such a case it is equitable to reform the contract so that each side bears a share of the unexpected costs, instead of permitting the whole loss to remain with the party on whom it chanced to light. In contract suits courts have generally seemed loath to divide damages, but in this class of case we see no objection other than tradition. Reformation as the child of equity can mold its relief to attain any fair result within the broadest perimeter of the charter the parties have established for themselves. (citation omitted) Where that arrangement has allocated the risk to neither side, a judicial division is fair and equitable. The division can follow from the special circumstances if there are any; in their absence an equal split would fit the basic postulate that the contract has assigned the risk to neither party."

mutual mistake or following the National Presto precedent, reliance on the mutual mistake theory would be justified in several cases.

Pursuing a mutual mistake cause of action might result in fairer treatment of the parties, because the facts in every particular dispute do not dictate absolute winners and losers. Dominated by our all-or-nothing notions of recovery, we have almost totally ignored what would appear in many situations to be the eminently sensible, split-the-loss resolution to a mutual mistake situation.²⁷² The decision that, within a single case, some claims are meritable while others are not, might be based on a mutual mistake analysis.

The mutual mistake exception should provide sufficient relief from the rule cited by the United States Supreme Court in the landmark United States v. Spearin decision: "... when one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered."²⁷³ Remedies such as reformation are available

²⁷² Mueller, "Contract Remedies: Business Fact and Legal Fantasy", 1967 Wis. L. Rev. 833, 836-837.

²⁷³ United States v. Spearin, 51 Ct. Cl. 155 (1916), aff'd., 248 U.S. 132, 136, 39 S. Ct. 59 (1918).

for Government contractors under the common law, and these remedies should provide sufficient grounds for relief, especially in the absence of a Differing Site Conditions clause.

B. SUPERIOR KNOWLEDGE

Superior knowledge is defined as vital knowledge or information not possessed by the other party which is necessary to the successful performance of the contract; it is generally a significant factor in determining allocation of risk.²⁷⁴ The Government has a duty to disclose information which is "vital" to the performance of the contract, and may affect a contractor's performance. The duty applies to any special information unknown or unavailable to the contractor.

The Court of Claims in Helene Curtis Industries Inc. v. United States,²⁷⁵ held that the Government's duty to disclose superior knowledge to its contractors exists independently of the theory of misrepresentation. The court outlined that the Government has a duty to disclose information to its

²⁷⁴ Markell, *supra* note 270.

²⁷⁵ *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963).

contractors when:

1. the Government has knowledge of information vital to the contract;
2. the Government knows or should know of the detrimental effect which non-disclosure would have upon performance;
3. the contractor neither knows nor has reason to know of such information; and
4. the Government knows or should know of the contractor's ignorance.

The theory behind superior knowledge is that the Government knows some critical facts neither known nor available to industry; that prospective bidders cannot obtain these facts from sources outside the Government, and the Government withholds the facts from the contractor.²⁷⁶ This theory of recovery was applied to differing site conditions in Hardeman-Monier-Hutcherson v. United States.²⁷⁷ However, courts and boards of contract appeals have held this doctrine inapplicable to existing physical conditions of an ordinary

²⁷⁶ Riggins Co., ASBCA No. 30760, 88-3 BCA ¶ 21,044 (Neither a misrepresentation nor concealment when it was "common knowledge" that water and sand were prevalent at a construction site; contractor had to pay for delay and costs of using different system.)

²⁷⁷ Supra note 89.

nature which are open to inspection. Recovery has been denied by the Department of Agriculture Board of Contract Appeals (AGBCA) in N.L. Larson and Son, Inc. even though the Government withheld a seismic report which indicated the rock condition encountered by the contractor, and the presence of steep slopes and visible outcroppings suggested a likelihood of hard rock.²⁷⁸ In Florida Dredge and Dock v. United States, the CAFC ruled that the Government has no duty to disclose information regarding the character and quality of the material at the bottom of a channel when the information was readily available.²⁷⁹ The contractor has the duty to seek and obtain information when it is reasonably ascertainable.²⁸⁰

The duty of disclosure does not pertain to statements that are without factual basis.²⁸¹ When Government opinions are based on fact, the Government must either disclose its

²⁷⁸ N. L. Larson & Son, Inc., AGBCA No. 85-201-3, 85-3 BCA ¶ 18,256.

²⁷⁹ Florida Dredge and Dock, Inc. v. United States, Fed. Cir. (No. 88-1282, 9 December 1988).

²⁸⁰ Supra note 61.

²⁸¹ Evans Reamer & Machine Co. v. United States, 181 Ct. Cl. 589, 386 F.2d 873 (1967), cert. denied, 390 U.S. 982, 88 S. Ct. 1102 (1968).

opinion or the facts on which the opinion is based.²⁸² The responsibility to furnish the information can be especially pronounced based on the factual circumstances. If the Government knows or should know that the contractor did not know the information, and if the information is the result of extensive Government studies and research, the Government will have a difficult time rationalizing nondisclosure.

The Government's failure to disclose pertinent information to a contractor may result in a successful claim for extra costs if the contractor was misled by the Government's withholding of information. In certain differing site condition cases, courts and boards of contract appeals have decided the superior knowledge issue first, disregarding the differing site conditions arguments. In Sanders Construction Company, the Department of Interior Board of Contract Appeals (IBCA) held that the Government had not disclosed certain information, namely that the operation maintenance history of a dam facility indicated that the condition of the reservoir was out of the ordinary.²⁸³ This superior knowledge, if disclosed, would have led the

²⁸² Supra note 20.

²⁸³ Sanders Construction Company, IBCA No. 2309, 90-1 BCA ¶ 22,412.

contractor to bid and perform differently; the IBCA characterized the information that the Government withheld as the more direct route to resolving the case.²⁸⁴ This duty or breach thereof forms another predictable basis for contractor relief, which would be enhanced if the contractor was unable to rely on a Differing Site Conditions clause.

C. MISREPRESENTATIONS

In the absence of a Differing Site Conditions clause, a principal issue is whether the contractor justifiably relied on the Government representations. A misrepresentation occurs when the Government erroneously represents the existence or nonexistence of a fact material to contract performance, upon which a contractor reasonably relies to his detriment.²⁸⁵ If the Government is deliberately misleading about site conditions, and the contractor unknowingly relies on these inaccurate representations, the contractor may be eligible for additional compensation.

Most of the cases decided under the theory of

²⁸⁴ *Id.*

²⁸⁵ *United States v. Atlantic Dredging*, 253 U.S. 1, 40 S. Ct. 423, (1920); *Woodcrest Construction Co.*, *supra* note 23.

misrepresentation concern situations involving changed physical conditions. These situations are not unlike Type I differing site condition claims, in that the contractor encountered physical conditions at the site which differed materially from those stated in the contract.²⁸⁶ Perhaps the reason that decisions discuss the theory of misrepresentation more frequently in this area is because a portion of the Differing Site Conditions clause is specifically directed toward this situation. However, boards of contract appeals and courts continue to be able to decide cases within the misrepresentation framework. Therefore, the representations in the contract documents are often a critical issue.

D. IMPLIED WARRANTY

The Government provides specifications in order to inform the contractor of physical conditions and to specify design methodology. The Government warrants both accuracy--breached if the facts are different than those represented--and the suitability--use of design, materials, and methods prescribed in specifications will result in a satisfactory and timely end product. It necessarily follows that the Government also

²⁸⁶ Riverport Industries Inc., ASBCA No. 30888, 87-2 BCA ¶ 19,876.

impliedly warrants that the Government-provided specifications are possible to meet. The contractor must only establish inaccuracy or unsuitability of the Government specifications, even if he has greater knowledge, unless the contractor knew or should have known of the inaccuracy or unsuitability.²⁸⁷

The Government also impliedly warrants that the specifications, if followed, will result in a workable item, meaning that the item can be produced or that the desired performance requirements can be achieved if the Government design is followed.²⁸⁸ Cases and appeals where the contractor has been denied the benefit of the implied warranty involve:

1. unusual risk of error/failure which was clearly disclosed, and the contractor expressly assumes the risk (contractor gambles);
2. errors/inaccuracies which were minor (rational contractor anticipates small problems);
3. errors/defects which were patent/obvious (contractor must exercise reasonable care and seek clarifications prior to bidding);
4. contractor misled by his own deduction (contractor

²⁸⁷ Harrington, Thum & Clark, "The Owner's Warranty of the Plans and Specifications for a Construction Project", 14 Pub. Con. L.J. 240, 251 (1984).

²⁸⁸ Markell, *supra* note 270 at 2.

cannot assert silence); and

5. extra costs incurred as a result of the contractor's inadequate methods of work (contractor received adequate specifications for the completed project).²⁸⁹

When considering warranty as a potential claim, the errors in the plans and specifications must have been material, and the contractor must have followed them to the letter before he can assert his claim.²⁹⁰

Where the Government prepares or furnishes design specifications, it bears responsibility for the correctness, adequacy and feasibility of the specifications.²⁹¹ If the plans and specifications, including information about site conditions, are materially wrong, and the false information results in cost overruns to the contractor, the Government can be held liable for the errors in the plans.²⁹²

When a defect surfaces in design specifications, the contractor should be granted relief under the theory that the Government has breached its warranty of the adequacy of the

²⁸⁹ Harrington, *supra* note 287 at 255.

²⁹⁰ Chambers, *supra* note 81 at 13.

²⁹¹ Markell, *supra* note 270 at 2.

²⁹² Chambers, *supra* note 81 at 13.

specifications rather than under the theory of impossibility of performance.²⁹³ Therefore, if the Government creates specifications and contracts for supplies to be manufactured in accordance with these specifications, there is an implied warranty that a satisfactory result will occur. The availability of an implied warranty is another predictable form of relief that contributes to the assertion that the necessity for a Differing Site Conditions clause is obviated.

E. COMMERCIAL IMPRACTICABILITY

Commercial impracticability is synonymous with actual impossibility as it has been broadly defined in Government contracts. Relief in this area has been granted different labels, such as "practical impossibility"²⁹⁴ or "bogus impossibility".²⁹⁵ The question of whether relief is granted often turns on the level of economic impossibility. For

²⁹³ Vogel, "Impossibility of Performance--A Closer Look," 9 Pub. Con. L. J. 110, 114-5 (1977).

²⁹⁴ Schooner, "Impossibility of Performance in Public Contracts: An Economic Analysis," 16 Pub. Con. L. J. 229, 233 (1986).

²⁹⁵ Sirianni, "The Developing Law of Contractual Impracticability and Impossibility: Part 1", 14 U.C.C.L.J. 30, 34-6 (1981).

example, when differing site conditions caused material changes in cost, methodology, and required more equipment, the performance was rendered commercially impracticable.²⁹⁶

To prove "practical impossibility" in Government contracts, the contractor must show that performance involves extreme difficulty or unusual expenses, that such difficulties or expenses were not contemplated by either party at the time the contract was signed, and that the Government assumed the risk of impossibility.²⁹⁷ While the first and second parts of this test require proof by a preponderance of the evidence, the third part, avoiding the assignment of the risk, generally proves more troublesome.²⁹⁸

As for the first hurdle, cases and appeals have demonstrated that substantial increases in cost are not enough to relieve contractual responsibilities. In J. Filiberto Sanitation, Inc., the Veterans Administration Board of

²⁹⁶ Supra note 253.

²⁹⁷ Pettit, "Impossibility of Performance/Edition II" 66-5 Briefing Papers 1 (1966).

²⁹⁸ Schooner, supra note 294 at 240. "For example, proof that the Government relaxed specification requirements without requesting a corresponding price reduction helps the contractor carry the burden of showing defective specifications. Proof that another contractor successfully manufactured the item at issue defeats the contractor's claim."

Contract Appeals (VABC) held that an extraordinary increase in waste dumping costs did not make the contract commercially impracticable, especially since the firm fixed price contract allocates those risks to the contractor.²⁹⁹ Certain boards of contract appeals have adopted benchmark tests to demonstrate that certain percentages of increases are not sufficiently onerous to provide a basis for relief.³⁰⁰ In Naughton Energy, Inc., the ASBCA held that a 59% increase in the price of coal did not make the coal delivery contract commercially impracticable for a small business contractor.³⁰¹ To establish that the cost of performance is commercially senseless, the contractor must prove that the increase in costs was caused by an event for which the contractor is not responsible, and that the increase in costs is so exorbitant that relief should be granted.³⁰² Relief for the cost increase might require

²⁹⁹ *J. Filiberto Sanitation, Inc.*, VABC No. 2696, 88-3 BCA ¶ 21,160, aff'd., 883 F.2d 1027 (C.A. Fed 1989).

³⁰⁰ *Robert L. Merwin & Co.*, GSBCA No. 6621, 83-2 BCA ¶ 16,745; *Jalaprather Cement Co.*, ASBCA No. 21248, 79-2 BCA ¶ 13,927.

³⁰¹ *Naughton Energy, Inc.*, ASBCA No. 33044, 88-2 BCA ¶ 20,800.

³⁰² *Schooner*, *supra* note 294 at 4. However, see *J. Filiberto Sanitation, Inc.*, *Supra* note 299 (extraordinary increase in the costs of dumping waste did not make contract commercially impracticable; contractor aware of price increase potential before entering into the contract).

showing that no reasonable buyer would pay the price for the item.³⁰³ The ASBCA has held that the contractor has the burden of showing that performance would be commercially senseless for other contractors as well.³⁰⁴ Two circumstances that commonly lead to claims of practical impossibility are mass production failure (when an item is incapable of sufficient mass production under any commercial method) or where it will be found to be so costly or difficult to go beyond the contemplation of the parties.³⁰⁵

As for the assumption of the risk issue, when the pricing provisions and contract clauses responsible for the risk allocation inadequately or improperly assign the risks, courts and boards of contract appeals must make the appropriate allocation.³⁰⁶ The general rule is that the contractor will be

³⁰³ Read Plastics, Inc., GSBCA No. 4159 et al., 77-2 BCA ¶ 12,609, recon. granted on other grounds, 77-2 BCA ¶ 12,855.

³⁰⁴ PRB Uniforms, Inc., ASBCA No. 21504 et al., 80-2 BCA ¶ 14,602.

³⁰⁵ Markell, *supra* note 270 at 5.

³⁰⁶ Schooner, *supra* note 294 at 241. "The courts and boards will also reallocate the risk where the assigned result appears improper." But see Trueger, "Accounting Guide for Government Contracts" p. 137 (9th Ed. 1988), "... Significant areas where the procurement regulations ... have made little or no real contribution ... boards of contract appeals and courts have been forced to step into the breach and establish

held to have assumed the risk of impossibility of performance only where the contractor has actual or constructive knowledge of the difficulty inherent in performance or represents to the Government that it has the knowledge or expertise to attain the sought-after level of performance.³⁰⁷

When the impossibility is preexisting or "antecedent", courts and boards of contract appeals will often determine whether the claimant assumed the risk. While antecedent impossibility is the more common form of practical impossibility found in Government contracts, supervening impossibility has different interpretations addressing the assumption of the risk. Antecedent impossibility requires the contractor to prove by a preponderance of the evidence that the Government retained the risk.³⁰⁸ In supervening impossibility cases, only a contrary custom or agreement can

by case law the principles the responsible parties had abdicated."

³⁰⁷ Vogel, *supra* note 293 at 135.

³⁰⁸ Bruner, "Impossibility of Performance in the Law of Government Contracts", 9 A.F. JAG L. Rev. 6, 15 (1967).

shift the risk.³⁰⁹

F. IMPOSSIBILITY

The doctrine of impossibility of performance provides a defense to a contractor confronted with a contract which he is incapable of performing. The doctrine of impossibility in Government contract law becomes significant in the resolution of legal rights when the existing situation during performance is not as the parties understood at the time they entered into the contract. Even though courts and boards of contract appeals have made inartful use of the remedy, an actual impossibility defense should apply only to situations where the work to be done may no longer be possible.³¹⁰

Adherence to the principle of "pacta sunt servanda" - contracts should be performed - impeded common law development

³⁰⁹ Schooner, *supra* note 294 at 241, citing *Dillon v. United States*, 140 Ct. Cl. 508, 156 F. Supp. 719 (1957); *Mitchell Canneries, Inc. v. United States*, 111 Ct Cl. 228, 77 F. Supp. 498 (1948).

³¹⁰ Corbin, *Contracts*, Section 1325, at 337 (1962), "absolute impossibility, sometimes called 'physical' impossibility, based on all human experience and applicable to all manner of men, whatever be their wisdom, strength or scientific training. All the king's horses and all the king's men cannot put Humpty Dumpty together again."

of the impossibility doctrine.³¹¹ However, eventually situations in which no contractor could perform resulted in findings of technical impossibility. This objective standard of impossibility of performance presents four recurring scenarios in which:

1. the attainment of the specified performance is beyond the ability of any contractor to meet - that is, the specified performance is "beyond the state of the art";

2. the use of materials, methods, or designs required by the specifications cannot attain the level of performance required by the specifications - that is, the specifications are defective;

3. the specified materials or components are not available commercially; or

4. one of several specified alternative methods of performance proves impossible.³¹²

The first scenario deals with the present ability of any contractor. The beyond the "state-of-the-art" standard is

³¹¹ Schooner, *supra* note 294. "The celebrated case of *Paradine v. Jane* bluntly and forcefully held that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

³¹² Markell, *supra* note 270.

progressive and changing, based on the most currently-available technological advances. While keeping up with changing standards and practices poses difficulties, courts and boards of contract appeals must deal with cases and appeals of advanced technical sophistication. Boards of contract appeals no longer ask "whether the thing can be done" but instead inquire as to the contemporaneous state of the art.³¹³ Extending the state of the art beyond prior boundaries requires a focus on the assumption of the risk.

When contract requirements cannot be attained using technology available at the time of contract performance, those requirements are objectively impossible.³¹⁴ For example, this has been found when:

1. the solution to the problem of hot microcracking encountered in the manufacture of pressure vessels required more sensitive radiography than was currently available;³¹⁵
2. the requirement that a battery-powered rescue radio beacon was required to operate continuously for 24 hours when this performance level had never been attained by any

³¹³ Schooner, *supra* note 294.

³¹⁴ Markell, *supra* note 270 at 2.

³¹⁵ Utah-Manhattan-Sundt, ASBCA No. 8991, 1963 BCA ¶ 3,839.

source;³¹⁶

3. the design analysis for the shock hardening of ships was both "commercially and absolutely" impossible;³¹⁷

4. the software to operate base-wide temperature and ventilation control could not be developed within a 450-day performance period;³¹⁸ and

5. tape recorder capable of operating while mounted on a rocket sled at speeds in excess of 1,000 miles per hour and acceleration of up to 50 times the force of gravity was beyond the state of the art.³¹⁹

The second scenario, known as the defective-specification type of impossibility, involves situations where performance is not unobtainable by other means. The design specifications are declared defective because the specified performance is impossible to achieve through use of the specified materials,

³¹⁶ Sparton Electronics, ASBCA No. 14431, 73-1 BCA ¶ 9,816.

³¹⁷ Foster Wheeler Corp. v. United States, 206 Ct. Cl. 533, 513 F.2d 588 (1975).

³¹⁸ H&H Electric Inc., ASBCA No. 29621, 86-3 BCA ¶ 19,303. See also Triax Co., ASBCA No. 33899, 88-3 BCA ¶ 20,830.

³¹⁹ Kinn Electronics Corp., ASBCA No. 13526, 69-2 BCA ¶ 8,061.

design, method or testing; defective specifications render successful performance impossible if strict adherence to the specifications is required.³²⁰

Courts and boards of contract appeals have confused the distinction between defective specifications and impossibility. Although deficient specifications may prevent fabrication of an item, and it may be said that performance is impossible, these are not the circumstances which create the legal doctrine of impossibility of performance.³²¹

A contractor is entitled to assume that the specifications must be followed unless they are waived or relaxed by the Government.³²² Contractors are generally entitled to rely on specifications. Relief has been granted to contractors for impossibility attributable to defective specifications where:

1. a Government-designed, three-pipe sprinkler system

³²⁰ *Markell*, *supra* note 270 at 3.

³²¹ *Dynalectron Corp. - Pacific Division*, ASBCA Nos. 11766, 12271, 69-1 BCA ¶ 7,595, aff'd. in part and rev'd in part, *Dynalectron Corp. v. United States*, 207 Ct. Cl. 349, 518 F.2d 594 (1975).

³²² *Markell*, *supra* note 270 at 3.

did not meet performance requirements;³²³

2. the Government-specified panelboard and conductors were incompatible;³²⁴

3. a contractually-required, hydrostatic-pressure test caused booster tubes to fail dimensional requirements;³²⁵

4. a tolerance build-up resulted in operational failures of door-opening mechanisms on parcel post receptacles;³²⁶ and

5. flare cases could not be produced to consistently meet drawing tolerances or pressure tests.³²⁷

The third of four recurring scenarios outlined occurs when the Government designates an item to be used in the performance of the contract, impliedly indicating commercial availability. The Government is more likely to be liable for performance failures if the part or component is designated

³²³ Leslie-Elliott Constructors, Inc., ASBCA No. 20507 et al., 77-1 BCA ¶ 12,354.

³²⁴ Santa Fe Engineers, Inc., ASBCA No. 21450 et al., 77-1 BCA ¶ 12,403.

³²⁵ Astro Dynamics, Inc., ASBCA No. 28320, 83-2 BCA ¶ 16,900.

³²⁶ MRC Corp., PSBCA No. 1083, 84-1 BCA ¶ 17,013.

³²⁷ Supra note 286.

by brand name or part number.³²⁸ Although the Government implicitly warrants the ability of a supplier once it approves the supplier's technical qualification; the Government does not however guarantee the supplier's willingness to undertake the work whenever a demand materializes.³²⁹ In Blount Brothers Corporation v. United States, specifications required that certain concrete be made using tan and brown washed river gravel. Although the contractor contended it was impossible to obtain gravel of the specified color, the ASBCA held that a source for the gravel existed in Montgomery, Alabama.³³⁰ However, the CAFC reversed, indicating that there was no substantial evidence supporting the ASBCA's finding since both the contractor and Government were unable to locate a sample

³²⁸ *Aerodex, Inc. v. United States*, 189 Ct. Cl. 344, 417 F.2d 1361 (1969).

³²⁹ *Franklin E. Penny Co. v. United States*, 207 Ct. Cl. 842, 524 F.2d 668 (1975). "The realities of business life absolutely negate any such assumptions . . . no breach of contract may be imputed to the United States simply because the manufacturers that it had listed as approved sources of supply declined to undertake the work for which they had been found qualified."

³³⁰ *Blount Brothers Corporation*, ASBCA No. 29862, 88-2 BCA ¶ 20,644.

after extensive searches.³³¹ Therefore, the Government has the responsibility to show how the contractor's search was neither extensive nor exhaustive, or in the alternative, to produce the item described in the specifications. This is necessary to counter the contractor's assertion that its search extended as far as reasonable from the area in which a contractor can be expected to acquire raw materials in performance of a contract.³³²

The burden is on the contractor to ascertain, prior to bidding, the time and money involved to obtain the item. A proposed method of analysis is a determination of whether the facts:

1. support a representation by the Government of commercial availability and, if so,
2. whether the contractor acted reasonably in procuring the specified items.³³³

To prove this second requirement, the contractor must be ready to demonstrate what actions were taken to obtain the

³³¹ *Blount Brothers Corporation v. United States*, 872 F.2d 1003 (Fed. Cir. 1989).

³³² *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228, 77 F. Supp. 498,503 (1948).

³³³ *Markell*, *supra* note 270 at 4.

items. It is the contractor's responsibility to make a good faith search of the alternatives before asserting a lack of commercial availability. The contractor also has the burden of exploring and exhausting alternatives prior to concluding that the contract is legally or commercially impracticable to perform.³³⁴

In the last of the recurring scenarios, the Government's implied warranty of design extends to all of the specified alternative methods of performance. When the Government provides two methods of performance, the contract implies that either will achieve the desired result.³³⁵ In Kaplan Contractors, Inc., the GSBCA held that the "thick wall" design alternative that could not be met by any contractor subsequently resulted in Government liability.³³⁶ In Detweiler Brothers, Inc., the ASBCA held for the contractor when the contractor utilized the option of using urethane foam insulation which did not produce satisfactory performance.³³⁷

³³⁴ Jennie-O-Foods, Inc. v. United States, 217 Ct. Cl. 314, 580 F.2d 400 (1978).

³³⁵ S&M Traylor Bros., ENGBCA No. 3852, 78-2 BCA ¶ 13,495.

³³⁶ Kaplan Contractors, Inc., GSBCA No. 2747, 70-2 BCA ¶ 8,511.

³³⁷ Detweiler Bros., Inc., ASBCA No. 17897, 74-2 BCA ¶ 10,858.

Therefore, the contractor will be able to obtain relief even if he chooses what eventually ends up to be the "wrong" choice. However, this implied warranty of design specifications does not extend to specifications requiring a minimum amount of materials, because there is no guarantee that this minimum will achieve the contractual requirements.³³⁹ All four of these recurring "impossibility" scenarios provide avenues for contractor relief, if the contractor is able to show that the risk of impossibility shifted to the Government.

G. CONCLUSION

The availability of these Common Law remedies should compensate a contractor who is unable to perform, as well as a contractor who may have found a Government error. In the absence of the Differing Site Conditions clause, these remedies would provide a more predictable and consistent basis for relief, because the contractor will be informed from the onset that he will have the burden of fulfilling the various elements of proof of the Common Law remedy sought.

³³⁸ Markell, *supra* note 270 at 4.

CHAPTER 10

SUMMARY

The Differing Site Conditions clause has been falsely praised for what it was supposed to accomplish: to reduce the risk or gamble of such unknown or unanticipated conditions otherwise attendant upon the performance of construction work.³³⁹ It appears, therefore, that the clause will continue to encourage contractors to submit bids for Government construction projects based upon their reasonable expectations, knowing that if a differing site condition should be encountered, the contract provides a possible remedy for the recovery of costs associated with overcoming such condition.

Unfortunately, the Differing Site Conditions clause has been the subject of much litigation between construction contractors and the Government.³⁴⁰ The enormous extent of this litigation has not resulted in any clearly defined precedents, because the cases and appeals are primarily decided on an

³³⁹ McNulty, *supra* note 1.

³⁴⁰ McClure, *supra* note 16 at 139.

exclusively factual basis. Although it is easy to highlight the inefficiencies in federal procurement, proposing solutions which satisfy the public's best interest proves more problematic.³⁴¹

The decisions of the courts and boards of contract appeals lack adherence to an organized, structured method.³⁴² Courts and boards of contract appeals draw conclusions without thorough explanations of several key concepts, such as materiality.³⁴³ Most judicial and administrative opinions dealing with differing site conditions duck the difficult task of analyzing the material difference and simply make the conclusory statement that the difference was material.³⁴⁴ This

³⁴¹ Schooner, *supra* note 294 at 264.

³⁴² McClure, *supra* note 16.

³⁴³ *Id.* at 175.

³⁴⁴ *Construction Claims Monthly*, March 1989, Vol. II, No. 3, p. 7. "The legal definition of materiality offers little guidance when addressing differing site condition issues. The law considers something to be 'material' if it affects the important interests of a party. For instance, Black's Law Dictionary defines 'material' as follows: 'Important; more or less necessary; having influence or effect; going to merits; having to do with matter, as distinguished from form. Representation relating to matter which is so substantial and important as to influence party to whom made . . .' This definition is of little use in determining when the variance in site conditions is sufficient to constitute a material difference."

lack of analysis also accounts for a lack of predictability since the board of contract appeals and court decisions do not fit a pattern that provide an acceptable rationale. The Differing Site Conditions clause is fraught with pitfalls for unwary contractors. The clause is not the cure-all contractors expect it to be, nor is it liberally interpreted by the Government boards.³⁴⁵

The Differing Site Conditions clause was designed to be asserted by either party. The Government can assert its right to reduce the contract price on the theory that the clause specifically refers to situations where conditions encountered decrease the costs of contractor performance from what should have been expected or what was represented in the contract documents. There is a dearth of cases involving this assertion (perhaps because of a contractor's natural reluctance to alert any Government representative to conditions that represent potential windfall savings), and in general, their resolution has not been favorable to the Government's position. Therefore, an apparent inequity exists since the Government has been unable to pursue the "owner's reduction". As for reported decisions in which the Government requested a downward adjustment under the Differing Site

³⁴⁵ Goetz, *supra* note 79.

Conditions clause, most contractors have not formally brought such matters to the attention of the contracting officer.³⁴⁶ Therefore, from the Government's vantage point, the Differing Site Conditions clause results in two problems: always being on the defensive, and having limited ability to predict the outcome of the myriad of factual disputes and differences which inevitably arise in the course of contract performance.

The problems previously outlined concerning the Differing Site Conditions clause, (e.g., its ineffective use as a sword by the Government, its uncertainty, the attempts to circumvent it, the lack of a clear "differing materially" standard, the reliance requirement, and the sporadically-enforced notice requirement) all necessitate a progressive solution.

In competitive acquisitions the Differing Site Conditions clause should not be used. While there is no statistical evidence of bid padding, both the Government and the contractor have long been litigating these issues and spending an inordinate amount of money in the process. While there are several summary statements of the inherent value of the Differing Site Conditions clause, they do not supply factual indications of how the clause has helped the industry. The

³⁴⁶ Medsger, *supra* note 90 at 17. "If the Government asserts a downward adjustment the ASBCA will probably require the Government to bear the burden of proving entitlement."

Claims Court in Shank-Artukovich, a Joint Venture v. United States has promulgated unsupported conclusions that the Differing Site Conditions clause saves the Government substantial sums if used properly.³⁴⁷ The competitive environment should naturally result in reasonable offers on the large majority of contracts.

The Government should contemplate using a separate contract line item number (CLIN) for site preparation and allow this portion of the contract to be accomplished on a cost-reimbursement basis. This strategy does not have to be used in every construction project. However, some projects entail a much greater risk of concealed conditions than others, such as renovation work, underwater work, and work in geographically-irregular areas.³⁴⁸

The use of a firm-fixed price contract for construction has resulted in various problems:

1. work must be specified in great detail, which changes once subsurface conditions are better known;
2. changes are costly and result in disputes and litigation; and

³⁴⁷ Shank-Artukovich v United States, 13 Cl. Ct. 346 (1987), aff'd, 848 F.2d 1245 (C.A. Fed 1988).

³⁴⁸ Grant, "Getting Paid for Concealed Conditions," in *Builder and Contractor*, July 1988, Volume 36, No. 7, at 26.

3. the contractor is required to take risks which in the end may result in a party receiving a windfall.³⁴⁹

The disadvantages of a firm-fixed price contract, which passes the maximum risk to the contractor, coupled with the Differing Site Conditions clause, which inartfully attempts to reduce the risk, inevitably result in many claims and disputes. However, the Differing Site Conditions clause does not offset or balance the harsh realities of the firm-fixed price contract. The inherent disadvantages of the firm-fixed price construction contract argue against its use especially in the site preparation area:

1. the total time from project origination to completion is very long due to the need to prepare complete drawings, details, specifications, and subsurface studies, as well as the receipt and evaluation of bids;

2. the Government cannot account for every contingency, and the factual distinctions argue that one party will receive an unfair benefit;

3. no motivation exists for the contractor to do anything but the absolute minimum; and

4. depending on the amount of competition, there are no

³⁴⁹ "Better Contracting for Underground Construction", Standing Subcommittee No. 4, Natural Academy of Sciences, Washington, DC, 1978.

guarantees that the proposed firm-fixed price is fair and reasonable.³⁵⁰

Therefore, the segregation of the site preparation area, and the payment of this area via a cost-reimbursement approach should balance the equities and risks. This approach is warranted to protect both the contractor and the Government. The additional effort involved in setting up this contractual structure is a short term investment which will yield long-term dividends.

³⁵⁰ *Id.*

CHAPTER 11

CONCLUSION

As the preceding chapters indicate, the problems associated with the Differing Site Conditions clause are many and varied. The Differing Site Conditions clause has neither protected the Government nor the contractor. The resultant litigation, coupled with the uncertainty of the protections of the Differing Site Conditions clause, argues for the cessation of the use of the clause.

The full-and-open competition involved in the sealed bid procedures should be sufficient to keep the award prices at a reasonable level. In addition, the Government should reserve a CLIN for the site preparation portion of the contract, so as to specifically allocate the risk of subsurface conditions for that particular aspect. Payment to the contractor on a cost-reimbursement basis for the site preparation CLIN is the most equitable method to deal with construction projects.

The abrogation of the Differing Site Conditions clause is justified.